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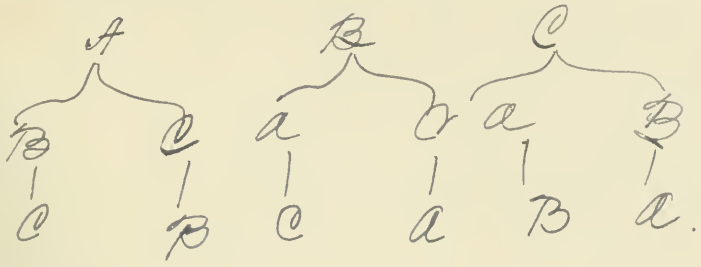

M. A. Gardiner,

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SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

SELECT CASES

AND

OTHER AUTHORITIES

ON THE

LAW OF PROPERTY.

BY

JOHN CHIPMAN GRAY,

ROYALL PROFESSOR OF LAW IN HARVARD UNIVERSITY.

VOLUME V.

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BOOK VIII.

CONDITIONAL AND FUTURE INTERESTS.

CHAPTER I.

CONDITIONAL ESTATES.

SECTION I.

IN GENERAL.

Lit. § 325. Estates which men have in lands or tenements upon condition are of two sorts, viz., either they have estate upon condition in deed, or upon condition in law, &c. Upon condition in deed is, as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent payable at one feast or divers feasts *per annum*, on condition that if the rent be behind, &c., that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, &c. And if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, &c., that then it shall be lawful to the feoffor and his heirs to enter, &c. In these cases if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the state of the feoffee is defeasible, if the condition be not performed, &c.

Lit. § 326. In the same manner it is if lands be given in tail, or let for term of life or of years, upon condition, &c.

Lit. § 347. No entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor,

or to the lessor, or to their heirs: and such re-entry cannot be given to any other person. For if a man letteth land to another for term of life by indenture, rendering to the lessor and to his heirs a certain rent, and for default of payment a re-entry, &c., if afterward the lessor by a deed granteth the reversion of the land to another in fee, and the tenant for term of life attorn, &c., if the rent be after behind, the grantee of a reversion may distrain for the rent, because that the rent is incident to the reversion; but he may not enter into the land, and oust the tenant, as the lessor might have done, or his heirs, if the reversion had been continued in them, &c. And in this case the entry is taken away forever; for the grantee of the reversion cannot enter, *causa qua supra*. And the lessor nor his heirs cannot enter; for if the lessor might enter, then he ought to be in his former state, &c., and this may not be, because he hath aliened from him the reversion.

Co. Lit. 214 b. Hereupon is to be collected divers diversities. First, between a condition that requireth a re-entry, and a limitation that *ipso facto* determineth the estate without any entry. Of this first sort no stranger, as Littleton saith, shall take any advantage, as hath been said. But of limitations it is otherwise. As if a man make a lease *quousque*, that is, until I. S. come from Rome, the lessor grant the reversion over to a stranger, I. S. comes from Rome, the grantee shall take advantage of it and enter, because the estate by the express limitation was determined.

So it is if a man make a lease to a woman *quamdiu casta vixerit*, or if a man make a lease for life to a widow, *si tamdiu in pura viduitate viveret*. So it is if a man make a lease for a 100 years if the lessee live so long, the lessor grants over the reversion, the lessee dies, the grantee may enter, *causa qua supra*.[1]

2. Another diversity is between a condition annexed to a freehold, and a condition annexed to a lease for years.

For if a man make a gift in tail or a lease for life upon condition, that if the donee or lessee goeth not to Rome before such a day the gift or lease shall cease or be void, the grantee of the reversion shall

[1] "Apt words of limitation are *quamdiu, dummodo, dum, quousque, durante, &c.*, *v.* 14 E. 2, Grant 92, a rent granted out of the manor of Dale, *quamdiu* the grantor shall dwell there. *Vide* 7 E. 4, 16, *quamdiu fuer' amicabiles*, 27 H. 8, 29 b; 3 E. 3, 15 a; and 3 Ass. p. 9. A man leases land *dummodo* the lessee shall pay twenty pounds, 37 H. 6, 27. A lease is made to a woman *dum sola fuerit*, 9 E. 4, 29 b. A man made a feoffment in fee until, *s. quosque* the feoffor had paid him certain money, 21 Ass. p. 18. *Vide* 13 El. Dy, 290, *acc' Pl. Com.* 414; 35 Ass. p. 14. A lease for years, if the lessee shall so long live, 14 H. 8, 13. A lease of lands till he be promoted to a benefice, &c., Lit. chap. Condit. 90 during the coverture. All these, and many others, are words of limitation, by force of which, the estate is determined without entry or claim: words of condition are *sub conditione, ita quod, si contingat, proviso, &c.* *Vide* Lit. c. Condit. 74 and 75; 3 H. 6, 7 a, b; 27 H. 8, 15, Dy., 28 H. 8, 13; 4 M. Dy. 139; 15 El. Dy. 318; 32 H. 8, Dy. 47. But these words *ad affectum, ea intentione, ad solvendum*, or other the like, do not make a condition in feoffments or grants, unless it be in the king's case, or in a last will, as it was resolved Pasc. 18 El. by all the justices of the Common Pleas." — *Mary Portington's Case*, 10 Co. 35 a, 41 b.

never take advantage of this condition, because the estate cannot cease before an entry; but if the lease had been but for years, there the grantee should have taken advantage of the like condition, because the lease for years *ipso facto* by the breach of the condition without any entry was void; for a lease for years may begin without ceremony, and so may end without ceremony; but an estate of freehold cannot begin nor end without ceremony. And of a void thing a stranger may take benefit, but not of a voidable estate by entry.

Co. Lit. 215 a. Another diversity is between conditions in deed, whereof sufficient hath been said before, and conditions in law. As if a man make a lease for life, there is a condition in law annexed unto it, that if the lessee doth make a greater estate, &c., that then the lessor may enter. Of this and the like conditions in law, which do give an entry to the lessor, the lessor himself and his heirs shall not only take benefit of it, but also his assignee and the lord by escheat, every one for the condition in law broken in their own time. Another diversity there is between the judgment of the common law, whereof Littleton wrote, and the law at this day by force of the Statute of 32 H. 8, c. 34. For by the common law no grantee or assignee of the reversion could (as hath been said) take advantage of a re-entry by force of any condition. For at the common law, if a man had made a lease for life reserving a rent, &c., and, if the rent be behind, a re-entry, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said Statute of 32 H. 8, the grantee may take advantage thereof, and upon demand of the rent, and non-payment, he may re-enter. By which Act it is provided, that as well every person which shall have any grant of the king of any reversion, &c., of any lands, &c., which pertained to monasteries, &c., as also all other persons being grantees or assignees, &c., to or by any other person or persons, and their heirs, executors, successors, and assignees shall have like advantage against the lessees, &c., by entry for non-payment of the rent, or for doing of waste or other forfeiture, &c., as the said lessors or grantors themselves ought or might have had. Upon this Act divers resolutions and judgments have been given, which are necessary to be known.

1. That the said Statute is general, viz., that the grantee of the reversion of every common person, as well as of the king, shall take advantage of conditions.

2. That the Statute doth extend to grants made by the successors of the king, albeit the king be only named in the Act.

3. That where the Statute speaketh of lessees, that the same doth not extend to gifts in tail.

4. That where the Statute speaks of grantees and assignees of the reversion, that an assignee of part of the state of the reversion may take advantage of the condition. As if lessee for life be, &c., and the reversion is granted for life, &c. So if lessee for years, &c., be, and the reversion is granted for years, the grantee for years shall take

benefit of the condition in respect of this word (*executors*) in the Act.

5. That a grantee of part of the reversion shall not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right.

6. That in the king's case, the condition in that case is not destroyed, but remains still in the king.

7. By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of borough English, the other at the common law, and the lessor having issue two sons, dieth, each of them shall enter for the condition broken, and likewise a condition shall be apportioned by the act and wrong of the lessee, as hath been said in the chapter of Rents.[1]

Lit. § 348. Also, if lord and tenant be, and the tenant make a lease for term of life, rendering to the lessor and his heirs such an annual rent, and for default of payment a re-entry, &c., if after the lessor dieth without heir during the life of the tenant for life, whereby the reversion cometh to the lord by way of escheat, and after the rent of the tenant for life is behind, the lord may distrain the tenant for the rent behind; but he may not enter into the land by force of the condition, &c., because that he is not heir to the lessor, &c.

Lit. § 351. But in such cases of feoffment upon condition, where the feoffor may lawfully enter for the condition broken, &c., there the feoffor hath not the freehold before his entry, &c.

Lit. § 378. Estates which men have upon condition in law, are such estates which have a condition by the law to them annexed, albeit that it be not specified in writing. As if a man grant by his deed to another the office of parkership of a park, to have and occupy the same office for term of his life, the estate which he hath in the office is upon condition in law, to wit, that the parker shall well and lawfully keep the park, and shall do that which to such office belongeth to do, or otherwise it shall be lawful to the grantor and his heirs to oust him, and to grant it to another if he will, &c. And such condition as is intended by the law to be annexed to anything, is as strong as if the condition were put in writing.

Co. Lit. 233 b. As to conditions in law, you shall understand they be of two natures, that is to say, by the common law, and by Statute. And those by the common law are of two natures, that is to say, the one is founded upon skill and confidence, the other without skill or confidence: upon skill and confidence, as here the office of parkership, and other offices in the next section mentioned, and the like.

Touching conditions in law without skill, &c., some be by the common law and some by the Statute. By the common law as to every

[1] This Statute is given in the second volume of these Cases, p. 405. — Ed.

estate of tenant by the curtesy, tenant in tail after possibility of issue extinct, tenant in dower, tenant for life, tenant for years, tenant by statute merchant or staple, tenant by *elegit*, guardian, &c., there is a condition in law secretly annexed to their estates, that if they alien in fee, &c., that he in the reversion or remainder may enter, *et sic de similibus*, or if they claim a greater estate in court of record, and the like.

Shep. Touch. 120. The nature of an express condition annexed to an estate in general, is this: that it cannot be made by nor reserved to a stranger; but it must be made by and reserved to him that doth make the estate. And it cannot be granted over to another, except it be to and with the land or thing unto which it is annexed and incident. And so it is not grantable in all cases; for the estates of both the parties are so suspended by the condition, that neither of them alone can well make any estate or charge of or upon the land; for the party that doth depart with the estate, and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. And if he that hath the estate, grant or charge it, it will be subject to the condition still; for the condition doth always attend and wait upon the estate or thing whereunto it is annexed: so that although the same do pass through the hands of an hundred men, yet is it subject to the condition still; and albeit some of them be persons privileged in divers cases, as the king, infants, and women covert, yet they are also bound by the condition. And a man that comes to the thing by wrong, as a disseisor of land, whereof there is an estate upon condition in being, shall hold the same subject to the condition also.[1]

REDE *v.* FARR.

King's Bench. 1817.

[*Reported* 6 *M. & S.* 121.]

Debt on bond dated 7th December, 1813, in the penal sum of £6,000, and the plaintiff set forth the condition, whereby (after reciting that he, by indenture bearing even date with the bond, had demised to James Cuddon certain lands and tithes situate at Letheringham and Hoo, in the county of Suffolk, for twelve years from the 11th of October then last, at the yearly rent of £532, payable upon the 11th of October in every year; and that the defendant and Robert Fiske, in order to secure to the plaintiff the regular payment of the said rent, had agreed to enter into the said bond) it was conditioned that if

[1] On the effect of limiting a remainder at common law after a particular estate subject to a condition, see *Warren* v. *Lee*, Dyer, 126 b (1556); Fearne, C. R. 270.

Cuddon, or the defendant, or Fiske should pay the said rent at the day and place named in the said indenture, the bond should be void; and the plaintiff assigned for breach, the non-payment by Cuddon, or the defendant, or Fiske, of the said rent at the day and place; and that on the 11th of October, 1815, £182 7*s*., parcel of one year's rent (the residue being satisfied), was in arrear.

The defendant craved oyer of the indenture, whereby the said rent was reserved payable as aforesaid to the plaintiff at his mansion-house at Barrham, "provided always, and these presents are upon this condition, that if the said yearly rent of £532, or any part thereof, shall be unpaid by the space of forty days next after the day or time whereon the same is hereinbefore reserved (although not demanded), then this demise, and every article, clause, and thing herein contained shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in any wise notwithstanding;" and Cuddon covenanted to pay the said rent at the time and place appointed, and according to the true intent of the said indenture. Whereupon the defendant pleaded that after the making of the indenture, and before the commencement of this suit, and before the 11th October, 1815, to wit, on the 11th October, 1814, £432, parcel of the said rent aforesaid for one year then elapsed, became due, and remained unpaid by the space of forty days and more, to wit, for the space of fifty days next after the day whereon the rent was reserved, whereby the said indenture, and every article, clause, and thing therein contained, as also the said bond, ceased, determined, and became void; and that afterwards Cuddon gave notice to the defendant not to pay the plaintiff any rent under the lease.

Replication that Cuddon fraudulently and without the consent, and against the will of the plaintiff, withheld from him the said arrears of rent by the space of forty days and upwards, next after the 11th of October, 1814, for the purpose thereby, as far as in him lay, of making the lease void; but that the plaintiff never did in any way assent thereto, or re-enter on the said demised premises, or do any act to make void the said demise, or to enforce or confirm the said supposed forfeiture; and that Cuddon hath since paid, and the plaintiff hath accepted, the said arrears of rent; and that Cuddon since the supposed forfeiture accrued, to wit, on the 12th of October, 1815, paid to the plaintiff, and he accepted from Cuddon, subsequent rent, to wit, £349 13*s*., remainder of the sum of £532, for one year's rent accrued to the plaintiff on the 11th of October, 1815, and that after the 11th of October, 1814, and after the expiration of forty days then next following and continually hitherto, Cuddon hath held and enjoyed, and still holds and enjoys, the demised premises under and by virtue of the said demise.

Demurrer assigning for cause that the plaintiff, in his replication, attempts to put several and distinct matters in issue, and matter wholly immaterial. Joinder.

Gifford, who argued on Friday last in support of the demurrer, did not address himself to the replication, which seemed, as agreed on both sides, to be multifarious and bad, but he took exception to the declaration, that the plaintiff had not laid any demand of the rent, without which, more especially where a surety is concerned, a penalty is not forfeited. *Sir R. Grobham's Case*, Hob. 82; 1 Roll. Abr. 460, pl. 10, 13; *Speccot* v. *Sheres*, Cro. Eliz. 828; *Chapman* v. *Chapman*, Cro. Car. 76. So in the case of re-entry, or a *nomine pœnæ*. *Maund's Case*, 7 Rep. 28 b, second resolution, Owen, 111, *per* Popham, C. J. 2dly. He argued in support of the plea, that the lease was void immediately upon non-payment of the rent for forty days. And he took a distinction between a proviso for re-entry in a lease for years, and a proviso that the lease shall be void; that in the one case an entry is required to determine the lease, but not in the other; *aliter* of a condition annexed to an estate of freehold, for there, though the condition be that the estate shall cease or be void, yet is an entry necessary, because an estate of freehold cannot begin nor end without ceremony. Co. Lit. 214 b. And a lease which is *ipso facto* void by the breach of the condition, cannot be made good by any acceptance afterwards (*Sir Moyle Finch's Case*, Cro. Eliz. 220; s. c. Moor, 291; *Pennant's Case*, 3 Rep. 64 b; 1 Roll. Abr. 475, pl. 3; Ibid. 476, pl. 2); much less can this lease be set up where nothing subsequent has been done to give a color to it, and where the defendant being only a surety, it is enough for him to show that the lease has by the contract of the lessor himself become void.

The court adjourned the hearing of the argument on the other side; and now, when *Richardson*, for the plaintiff, was about to address the court,

Lord Ellenborough, C. J., delivered judgment. The court have looked into the cases and authorities cited, and are of opinion that the proviso does not vacate the lease entirely, although it does as against the lessee. It does not follow, even where leases are vacated by Act of Parliament, as bishop's leases, or leases made without the consent of dean and chapter, that they may not be enforced by persons who are not privy or acting in contravention of any law. In this case, as to this proviso, it would be contrary to a universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for twelve years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void. On this principle, even if it were not borne out so strongly, as it is by the current of authorities, it would be sufficient to hold that the lease was only void as against the lessee, not against the lessor. In Co. Lit. 06 b, it is laid down: "If a man make a feoffment in fee, upon condition that the feoffee shall re-enfeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be past, the state of the feoffee is absolute; for the

feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for non-performance thereof. And so it is if A. be bound to B. that J. S. shall marry Jane G. before such a day, and before the day B. marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could never be performed. And this is regularly true in all cases." If that be a principle of law, that a party shall not take advantage of his own wrong, then a lessee shall not avail himself of his own act to vacate his lease. As to a demand, we do not think that any was necessary, inasmuch as the rent was to be paid at the house of the lessor. What sort of a demand can the lessor make at his house if the lessee is absent? This objection, therefore, cannot apply to a case where time and place for payment of the rent are thus fixed by the instrument. On these grounds we are of opinion that there ought to be judgment for the plaintiff.[1]

DOE d. FREEMAN *v.* BATEMAN.

King's Bench. 1818.

[*Reported* 2 *B. & Ald.* 168.]

Ejectment for two messuages, in the parish of St. Luke, Chelsea. The demise was laid on the 26th December, 1817. The cause was tried at the sittings after Easter Term, 1818, before *Abbott*, J., when a verdict was taken for the plaintiff, subject to the opinion of the court, on a case which stated in substance as follows: The defendant, Bateman, being possessed of a term of years in the premises in question, by a lease dated 12th May, 1812, demised the premises to Freeman, the lessor of the plaintiff, for a term co-extensive with his own term, reserving rent, and subject to certain conditions, one of which was, that Freeman should not open a public-house on the premises without the license, in writing, of Bateman. The lease contained the usual clause for re-entry in case of a breach of any of the covenants or conditions. Freeman entered into the premises, and afterwards opened a public-house without having obtained the license in writing of Bateman; and the latter having entered for the breach of this condition, this ejectment was brought by Freeman to recover the possession. This case was argued by *Curwood* for the plaintiff, and *Taddy*, Serjt., for the defendant. For the plaintiff it was contended that the defendant, having parted with his whole term, had no reversion, and therefore no right of entry for the condition broken; that, upon assigning his whole interest to the plaintiff, the privity of estate was destroyed, and that a right of entry could not be reserved to, or exist in, a stranger. On the other side it was insisted, that the condition was not destroyed by the

[1] See Gray, Restraints on Alienation, § 101, note; 2 Taylor, Landl. & Ten., § 492. But cf. *Sheaffer* v. *Sheaffer*, 37 Pa. 525 (1861).

defendant's having granted away the whole reversion; and the following authorities were cited, Lit. § 347; 5 Vin. Ab. 312, pl. 17; Bac. Abr. tit. Condition, E; Co. Lit. 202 a.

Cur. adv. vult.

ABBOTT, C. J., now delivered the opinion of the court. This case was argued before us at Serjeants' Inn, and upon the facts found, the single question of law was this, whether a lessee for years, having made a conveyance operating as an assignment of his whole interest in the land, containing a covenant on the part of the assignee not to open a public house on the demised premises without license, and containing also a clause of re-entry on breach of the covenant, could upon an actual breach thereof enter upon the land and avoid his conveyance. Or, in other words, whether, if an assignment of a term of years be made upon a condition, the assignment shall be absolute and the condition void. No question arose as to the capacity of a real or personal representative to make the entry; for the entry was made by the assignor himself. The only argument adduced against the right of entry or validity of the condition was, that an entry must always be made by a person entitled to the reversion, and by no other; and consequently that as the original termor had in this case, by the deed of assignment, parted with his whole estate, and no reversion was left to him, he could not enter. And, to be sure, if the premises here assumed be true, the conclusion is properly drawn. But we think the premises from which the conclusion was drawn are untrue. And that they are untrue is manifest from the familiar case put in Lit. § 325, of a feoffment in fee rendering rent, with a clause of re-entry, if the rent be unpaid; in which case it is said the feoffor or his heirs may enter for the condition broken. In this case, the feoffor has no reversion; the lands are not, nor since the Statute of *Quia emptores* can be, holden of him, but must be holden of the superior lord of the fee. Another instance is also mentioned in Lord Coke's commentary upon this section, Co. Lit., fo. 202. According to the text of Littleton, the party making the entry shall have and hold the land in his former estate; but according to the commentary, although this is regularly true, yet it faileth in many cases, and one of the cases of failure is that of a feoffment in fee upon condition, made by a man seised in right of his wife. The feoffor dieth, and the condition is broken. The heir of the feoffor shall enter; yet the heir at the time of his entry hath no reversion, and after the entry his estate doth vanish, and presently the estate is vested in the wife. For these reasons, we think the defendant was entitled to the verdict, and the *postea* must be delivered to him.

Judgment for defendant.

HAYDEN *v.* STOUGHTON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. **1827.**

[*Reported* 5 *Pick.* 528.]

WRIT of entry. The parties stated the following case.

Lemuel Drake died seised in fee of the demanded premises and of several other parcels of land in Stoughton, in 1806. In his will, which was approved and allowed on the 5th of November in that year, the demanded premises were disposed of as follows: "I give to the town of Stoughton my lot of land in said town, which I bought of Ephraim Wales (the land in controversy), containing about eight acres; also about twenty-five acres of woodland in said town, which I have bargained for of Elijah Belcher; and in failure of receiving a deed of said Belcher for said land, I give to said town three hundred dollars. Both of the above pieces of land (or money instead of the last piece) I give to said town for the purpose of building a school-house for the use of a free grammar-school (or other school, as said town may direct). Provided said school-house is built by said town within one hundred rods of the place where the meeting-house now stands." The testator gives a small legacy to a nephew, and another to a niece, to be paid when they should respectively arrive at the age of eighteen years; but if either of them should die before that time, then the legacy should go to the use of the school. He also gives to the precinct in Stoughton certain lots of land, part for a parsonage and part for the use of the ministry; but "if the meeting-house is removed from the lot it now stands on, and no other built in its stead," then he gives these lots "to the use of the free school above mentioned." He appoints his wife executrix, and besides some specific devises to her, the will contains the following provision: "All the remainder of my estate, of what name or nature soever, or wherever the same may be found, I give and bequeath to my beloved wife Abigail Drake, her heirs and assigns forever."

The demandants are part of the heirs at law of Abigail Drake, but not of Lemuel Drake.

On the 5th of May, 1806, the town of Stoughton voted to "accept the donation of Lemuel Drake, and to make provision for performing the conditions on their part, agreeable to the will of said deceased, as soon as the circumstances of the town will permit."

Abigail Drake died in 1806 intestate; and administration *de bonis non*, with the will of Lemuel Drake annexed, was committed to Samuel Talbot, who on the 14th of March, 1817, delivered possession of the demanded premises to the town of Stoughton, and accounted for the rent up to that time; and the town has occupied the premises ever since.

But the town had not built any school-house within one hundred rods of the meeting-house before the commencement of this action.

The records of the town prior to the date of the writ, and reports of committees referred to in such records, were made part of the case. They showed that the subject of the donation had been frequently before the town, but it did not appear from them that the town had begun to perform the conditions of the devise. In 1818 the town voted "to take 116 dollars and one year's interest of the same (it being the rent of a meadow and the interest of a donation given to the town by Mr. Lemuel Drake, &c.) for the use of schooling the present year, and relinquish so much of the school money that is granted by the town the present year for schooling."

If on these facts and others appearing in the records and reports above mentioned, the town of Stoughton had forfeited the land demanded, and if the demandants were entitled to reclaim it, the tenants were to be defaulted; otherwise the demandants were to become nonsuit.

Metcalf for the demandants.

Leland for the tenants.

The cause was continued for advisement, and the opinion of the court was afterwards drawn up by

PUTNAM, J. The first question which the case presents for decision is, whether the devise was upon a condition precedent or subsequent. We are all clearly of opinion that it was upon a condition subsequent, and that the estate vested immediately in virtue of the devise. The fee did not rest in abeyance until the school-house should be built, but was to be forfeited if it should not be built in a reasonable time.

The next inquiry is, whether the devisees have forfeited the estate by reason of their not having built the school-house, according to the condition of the devise. Where no particular time is mentioned for the performance of a condition subsequent, the law requires that it should be done in a reasonable time. It is otherwise of conditions precedent, which are for the advantage of the party performing the first act. They may be performed at the will of the party and at such time as he pleases. Plowd. 16. But in the case at bar benefit was conferred presently by the devise of the estate. And the party entitled to have the estate upon a forfeiture is not to be bound by the mere will and pleasure of the devisees as to the time or manner of performing the condition, for that would in effect destroy the condition. They might never perform it. The devisees are therefore to perform in a reasonable, viz. a convenient time — "according to the nature of the thing to be done." Com. Dig. Condition, G, 5. A devise upon condition to pay debts; the debts must be paid in convenient time.

The devisees, by accepting this devise and entering into the land, undertook to build the school-house in a convenient time within one hundred rods of the place where the meeting-house then stood. It is

said in Co. Lit. 208 b that if one make a feoffment in fee, upon condition that the feoffee shall enfeoff a stranger, and no time limited, the feoffee shall not have during his life to make the feoffment, for then he should take the profits in the mean time to his own use, which the stranger ought to have, and therefore he ought to make the feoffment as soon as conveniently he may; and so it is of the condition of an obligation.

The intent of the testator was, that the school-house should be built at the place which he designated; not that the devisees should have the land without the charge. The building of the house is a local act, which the devisees should have performed, for the accomplishment of the benevolent design of the testator, in a convenient time. Upon the same reason as is said in *Bothy's Case*, 6 Co. 31, that where the act is local, and the obligor may perform it for the benefit of the obligee in his absence, there the obligor ought to do it in a convenient time. The house might be built by the devisees without the concurrence of any other party, so the case is not like that which is put, of a local act to be done with the concurrence of an obligor and obligee; in which case the obligor hath his lifetime to perform, unless hastened by request. It is clear to our minds, that the devisees were not at liberty to postpone the building at their own pleasure, but that they have forfeited the land, if they have permitted an unreasonable time to pass without performing the condition.

Of that the court must determine from the facts which are found. The will was proved in 1805. In 1806 the inhabitants voted to accept the estate and perform the condition — twenty years before the action was brought — and no school-house has been built. The inhabitants of the town, during this long period, often met and passed votes contradictory and trifling, and still continuing to take the rents and profits of the land. They have omitted to do in that long period of time, what might have been done in a month as well as in a century. It seems to us that they have not conformed to the manifest intention of the testator. They have forfeited the estate.

We are next to consider who are entitled to the estate upon its forfeiture. Does it belong to the heirs at law of the testator, or to the plaintiffs, who represent the residuary devisee, to whom the testator devised all the remainder of his estate, of what name or nature soever, or wherever the same might be found?

In the construction of wills, the first and great object is to give effect to the intent of the testator, if it can be done without violating any rules of the law. And it is a rule, that the heir at law is not to be disinherited, unless such appears clearly to be the intention of the devisor. If the devise of land should be void because the devisee is incapable of taking, and the devisor should give all his real estate not before disposed of, the land would be included in the residuary clause. It is said in Perkins, section 564, that in the case of a devise, the remainder shall not be avoided by the entry of the heir for the condition

broken, because the will of the devisor shall be observed in as much as it may be.

So in *Benet* v. *French*, cited in *Sherewood and Nonne's Case*, 1 Leon. 251, where a man seised of lands devised a parcel called Gages to the erecting of a school, and all his other lands to French in fee, the devise of Gages was held void, because no person was named; and it was further holden, that it passed by the general words to French. I suppose the court construed it to mean other lands *not before devised*, because the Gages were not before devised, by reason of there being no devisee named who should take the land, and so passed to the residuary devisee. Upon the same principle, if the devisee die before the making of the will, the devise is void, and the land shall pass by the residuary clause. *Doe* v. *Sheffield*, 13 East, 526, where the testator devised land to the sisters of J. H. as tenants in common. There had been three sisters of J. H., but two died before the testator. He then gave all his messuages, lands, &c., not thereinbefore disposed of, to Scott. And the court held, touching the point we are now considering, that if the surviving sister had not taken the whole, but only a third, the residuary devisee would have taken the two thirds, because the testator made no disposition of the two thirds as the devisees of the two thirds died before the making of the will. It would not be considered as a valid devise, for the want of a devisee in existence at the time of making the will; and no better than if the devise had been of a particular estate to a monk; which would be void, and the remainderman would take immediately, as the monk was not capable of taking at all. Perk., sections 566, 567.

But where there was a devisee in existence, capable of taking the land, at the time when the will was made, but who should die before the will should be consummated by the death of the devisor, it would be considered as a lapsed devise. And in such case, inasmuch as the devisor had disposed of his whole interest in the land, if he had died immediately after making the will, the estate would have vested in the devisee. The law supposes that the devisor did not contemplate or intend that the residuary clause or devise of all his land not before disposed of, should embrace land contained in the lapsed devise. The residuary clause touching real estate is to include all the interest of the devisor which he had not disposed of when the will was made, and the heir is not to be defeated on account of the contingency of the death of the devisee after the making of the will; which the devisor could not foresee.

It is true that in regard to personal property, the law allows the residuary legatee to take whatever shall eventually turn out not to be disposed of, whether it arise from accident or design. And the counsel for the plaintiffs have argued, that there is no good reason for the distinction, and that lapsed devises of real estate should go to the residuary devisee, as well as lapsed legacies of personal. There is however a marked difference in the effect of a will upon personal, and

upon real property. The personal estate which is acquired after the will passes by the will, but real property acquired after the will does not pass, and is not affected by any disposition in a will made before its acquisition. The testator can devise only such real estate as he has at the time of making the will. The law upon this subject, viz. that the heir, and not the residuary legatee or devisee, shall have the advantage of lapsed devises, is now settled, and has been so held for more than half a century. *Doe* v. *Underdown*, Willes, 293, and the cases cited, particularly *Wright* v. *Hall*, cited in Willes, 299. In which last case Lord King says, "The testator makes his will as if he were to die that moment, and it cannot be presumed that he intended to devise a contingency which afterwards happened (viz., the death of the devisee after the will and before the devisor), and which he could not foresee."

So in *Gravenor* v. *Hallum*, Ambl. 645, the Lord Chancellor Camden considers the law to be settled. So Lord Chancellor Hardwicke, in *Durour* v. *Motteux*, 1 Ves. Sen. 321. See also *Cambridge* v. *Rous*, 8 Ves. Jun. 25.

We are disposed to think this point settled, and upon as good reason certainly as the rule applicable to lapsed personal legacies.

But the devise under consideration cannot be viewed as lapsed. A lapsed devise is where the devisee dies after the making of the will and before the testator. But here the devisees remain as a corporation aggregate, and the estate vested in them as a conditional fee simple. It was not, therefore, technically a lapsed devise. We are now to consider the effect of it.

The third rule laid down by Chief Justice Willes in *Doe* v. *Underdown*, and which has been recognized in a late case of *Doe* v. *Scott*, 3 M. & S. 300, is, that when a testator has given away all his estate and interest in certain lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give anything in these lands to his residuary devisee. That would be properly the case of a lapsed devise of real estate, and the heir, and not the residuary devisee, shall have the benefit of it. The converse of that proposition, viz. that if the testator has not given away all his interest in the land, so that if he were to die immediately something would remain undisposed of, it is to be presumed that he intended to give the remainder in such lands to the residuary devisee, was the rule adopted in the case of *Doe* v. *Scott*; and that rule we think must be applied to the case at bar.

In *Doe* v. *Scott* the testator devised all his lands to J. M. and his heirs forever, provided that he or his heirs do within six months after the decease of the devisor assure certain premises to R. M. and his children, viz. to R. M. for life, and his children in fee; and he gave all the rest of his lands wheresoever &c. to John and James Scott. J. M. and R. M. died after the making of the will and before the testator, bachelors. And the case was determined in favor of the Scotts, the

residuary devisees, on the ground, that there was no devise of the fee absolutely; for that if J. M. did not assure to R. M. for life, remainder in fee to his children, there would be an interest in the devisor undisposed of by that devise, which would pass by the residuary clause. Lord Ellenborough, in delivering the opinion, states with approbation the rule laid down by Chief Justice Willes in *Doe* v. *Underdown*, that the intent of the testator is to be taken as things stood at the time when the will was made, and that the devise must mean the rest and residue unbequeathed at the time of making the will.

Now we think the principle of that decision is exceedingly applicable to the case at bar. In this case, as in that, the devise was of a conditional and not of an absolute fee. There was a contingent interest which the devisor might have disposed of if he had pleased, to take effect upon the forfeiture of the estate; and he has in the residuary clause used words which are broad enough to pass the contingent interest. It is clear that the testator did not dispose of his whole interest to the inhabitants. The inhabitants might not choose to perform the condition, and so might forfeit their interest. The testator might have limited over that contingent interest specially. If he had done so, there can be no doubt but that it would have been a good limitation of his remaining interest. He made no limitation over. But nevertheless the devise did not lapse. The inhabitants became seised of the fee simple conditional, and the contingent interest not otherwise disposed of was disposed of by the residuary clause.

We have been greatly assisted in this investigation by the able and learned arguments of the counsel. The result of the whole is, that the devise to the inhabitants of Stoughton was upon a condition subsequent, and the estate vested accordingly; that they have forfeited the estate by neglecting to comply with the condition; that the testator had an interest undisposed of, depending upon the contingency of the performance or non-performance of the condition, which passes to the residuary devisee; and that the plaintiffs claiming under her are entitled to recover.

The defendants must therefore be defaulted.

RICE *v.* BOSTON & WORCESTER RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1866.

[*Reported* 12 *Allen*, 141.]

WRIT OF ENTRY to recover a parcel of land in Brighton.

At the trial in the Superior Court, before *Vose*, J., it appeared that on the 12th day of May, 1834, the demandant's father conveyed the demanded premises to the tenants by a deed of warranty, which stated that the conveyance was made upon the express condition that the cor-

poration should forever maintain and keep in good repair a pass-way over the same, and also certain fences; the premises being land over which the railroad of the tenants passes. The demandant's father then in June, 1842, conveyed to the demandant a large tract of land, the description of which included the demanded premises, by a deed of warranty; and died intestate, before any breach of condition. The demandant offered evidence of a breach of condition after his father's death. No entry for breach of condition was made before bringing this action. The judge excluded the offered evidence, and instructed the jury that the demandant was not entitled to recover; and a verdict was accordingly returned for the tenants. The demandant alleged exceptions.

F. A. Brooks, for the demandant.

G. S. Hale, for the tenants.

Bigelow, C. J. It is one of the established rules of the common law that the right or possibility of reverter which belongs to a grantor of an estate on condition subsequent cannot be legally conveyed by deed to a third person before entry for a breach. This rule is stated in Co. Lit. 214 a in these words: "Nothing in action, entry, or re-entry can be granted over;" and the reason given is "for avoiding of maintenance, suppressing of rights, and stirring up of suits," which would happen if men were permitted "to grant before they be in possession." This ancient doctrine had its origin in the early Statutes against maintenance and champerty in England, the last of which, 32 Henry VIII. *c.* 9, expressly prohibited the granting or taking any such right or interest under penalty, both on the grantor and the buyer or taker, of forfeiting the whole value of the land or interest granted, or as Coke expresses it, "the grantor and grantee (albeit the grant be merely void) are within the danger of the Statute." Co. Lit. 369 a. The principle that a mere right of entry into land is not the subject of a valid grant has been fully recognized and adopted in this country as a settled rule of the law of real property, both by text-writers and courts of justice. 2 Cruise Dig. (Greenl. ed.) tit. xiii. *c.* 1, sect. 15. 1 Washburn on Real Prop. 453. 2 Ib. 599. 1 Smith's Lead. Cas. (5th ed.) 113. *Nicoll* v. *New York & Erie Railroad*, 2 Kernan, 133. *Williams* v. *Jackson*, 5 Johns. 498. *Hooper* v. *Cummings*, 45 Maine, 359. *Guild* v. *Richards*, 16 Gray, 309.

The effect of a grant of a right or possibility of reverter of an estate on condition is thus stated in 1 Shep. Touchstone, 151, 158: A condition "may be discharged by matter *ex post facto*; as in the examples following. If one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged forever." So in 5 Vin. Ab. Condition (I. d 11), the rule is said to be, "when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the con-

dition is gone." See also 1 Washburn on Real Prop. 453. *Hooper* v. *Cummings*, 45 Maine, 359. The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach, because the right was not assignable. In the light of these principles and authorities, it would seem to be very clear that the original grantor of the demanded premises destroyed or discharged the condition annexed to his grant to the defendants by aliening the estate in his lifetime and before any breach of the condition had taken place.

The only doubt which has existed in our minds on this point arises from the fact that the son and heir of the original grantor of the premises is the demandant in this action. But on consideration we are satisfied, not only that the son took nothing by the deed, but also that the possibility of reverter was extinguished, so that the original grantor had no right of entry for breach after his deed to his son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can take only by virtue of the privity which exists between ancestor and heir. This privity is essential to the right of the heir to enter. But if the original grantor aliens the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No one can claim as heir until the decease of the grantor, because *nemo est hæres viventis;* and upon his death his heir has no right of entry, because he cannot inherit that which his ancestor had aliened in his lifetime. The right of entry is gone forever. Perkins, sections 830 – 833. Lit. sect. 347.

It may be suggested, however, that if the deed is void and conveys no title to the grantee, the right of entry still remains in the grantor and is transmissible to his heir. This argument is inconsistent with the authorities already cited, which sanction the doctrine that alienation by a grantor of an estate on condition before breach extinguishes the condition; it also loses sight of the principle on which the doctrine rests. The policy of the law is to discourage maintenance and champerty. Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of securing an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as the foundation of his claim. His deed is therefore effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he had unlawfully conveyed. Nor can the grantee avail himself of the grant of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he has taken in contravention of the rules of law. Both parties are therefore cut off from claiming

any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law. It is always competent for a party in a writ of entry to allege that a deed, under which an adverse title is claimed, although duly executed, passed no title to the grantee, either because the grantor was disseised at the time of its execution, or because the deed for some other reason did not take effect. Stearns on Real Actions, 226.

We know of no Statute which has changed the rules of the common law in this Commonwealth in relation to the alienation of a right of entry for breach of a condition in a deed. By these rules, without considering the other grounds of defence insisted upon at the trial, it is apparent that the demandant cannot recover the demanded premises: not as heir, because he did not inherit that which his father had conveyed in his lifetime; nor as purchaser, because his deed was void.

Exceptions overruled.

SECTION II.

LICENSE AND WAIVER.

PENNANT'S CASE.

QUEEN'S BENCH. 1596.

[*Reported* 3 *Co.* 64 *a.*]

IN an *ejectione firmæ*, between *Harvy*, plaintiff, and *Oswald*, defendant, on a demise made 37 Eliz. by John Pennant to the plaintiff, of certain land in Ardeley, in the county of Essex, for three years, from the feast of All Saints, *ann.* 37. The defendant pleaded, that the said John Pennant was seised of the said land in fee, and *anno* 35. demised it to the defendant for ten years, yielding the yearly rent of £33 10*s.* at the feast of St. Michael, and the Annunciation of our Lady; and that he was possessed, till Pennant ousted him, and demised to the plaintiff, and he re-entered, &c. The plaintiff replied, and confessed the said lease, but further said, that the said lease was on condition, that if the defendant, his executors or administrators, at any time without the assent of the said John Pennant, his heirs or assigns, did grant, alien, or assign the said land or any part thereof, that then it should be lawful for the said Pennant and his heirs to re-enter: and that the defendant, *anno* 35, granted to one Taylor parcel of the said land for six years, without the assent of Pennant, for which he re-entered, and made the lease to the plaintiff, *prout*, &c.

The defendant, by way of rejoinder, said, that before the re-entry

Pennant accepted the rent due at the feast of the Annunciation of our Lady, after the assignment by the hands of the defendant Walter Oswald. To which the plaintiff, by way of sur-rejoinder, said that Pennant before the receipt of the rent had no notice of the said demise to Taylor, on which plea the defendant did demur in law: and Trin. 39 Eliz. it was adjudged for the plaintiff. And in this case these points were resolved: —

1st. That the condition being collateral, the breach of it might be so secretly contrived, as to be impossible for the lessor to come to the knowledge of it, and therefore notice in this case is material and issuable, for otherwise the lessee would take advantage of his own fraud, for he might make the grant or demise so secretly, and so near the day on which the rent is to be paid, as to be impossible for the lessor to have notice of it: but if a man makes a lease for years rendering rent, on condition that if the rent be behind, that it shall be lawful for him to re-enter; in that case, if the lessor demands the rent, and it is not paid, and afterward he accepts the rent, (before the re-entry made) at a day after, he hath dispensed with the condition, for there the condition being annexed to the rent, and he having made a demand for the rent, he well knew that the condition was broke: but although in such a case he accepts the rent (due at the day for which the demand was made) yet he may re-enter, for as well before as after his re-entry, he may have an action of debt for the rent, on the contract between the lessor and lessee, and that was the first difference between a collateral condition and a condition annexed to rent. *Vide* 45 Ass. 5.[1]

The second difference was, that in case of a condition annexed to rent, if the lessor distrains for the same rent for which the demand was made, he hath thereby also affirmed the lease, for his distress for the rent received; for after the lease determined he cannot distrain for the rent. 14 Ass. 11. *Accord.*

The third was, that as well in case of a condition annexed to rent, as in case of a condition annexed to any collateral act, if the conclusion of the condition be, that then the lease for years shall be void; there, no acceptance of rent due at any day after the breach of the condition will make the void lease good. And so a difference between a lease which is *ipso facto* void without any re-entry, and a lease which is voidable by re-entry; for a lease which is *ipso facto* void by the breach of the condition cannot be made good by any acceptance afterwards. Plow. Com. in *Browning and Beston's Case*, 133.

The fourth was, as the affirmation of a voidable lease by parol for money (or other consideration) will not avail the lessee; so the acceptance of a rent, which is not *in esse*, nor due to him who accepts it, will not bind him: as if land be given to husband and wife, and to the heirs of the body of the husband, the husband makes a lease for forty years and dies, the issue in tail accepts the rent in the life of the wife,

[1] See, accordingly, *Hartshorne* v. *Watson*, 4 Bing. N. C. 178 (1838); *Jackson* v. *Allen*, 3 Cowen, 220 (1824). — Ed.

and afterward the wife dies; yet the issue shall avoid the lease; for at the time of the acceptance no rent was *in esse*, or due to him. *Vide* 32 H. 8, Br. Acceptance.

The fifth was between a lease for life and a lease for years, for in the case of a lease for life, if the conclusion of a condition annexed to the rent (or other collateral act) be, that then the lease shall be void, there (because an estate of freehold created by livery, cannot be determined before entry) in such case acceptance of rent due at a day after shall bar the lessor of his re-entry, for this voidable lease may well be affirmed by acceptance of rent: and therefore, if a man makes a lease for years, on condition that if the lessee do not go to Rome, or any other collateral condition, with conclusion that the lease shall be void, in that case, if the lessor grants over the reversion, and afterwards the condition is broke, the grantee shall take benefit thereof; for the lease is void, and not voidable by re-entry; and therefore the grantee who is a stranger, may take benefit thereof; but if the lease be made for life with such condition, there the grantee shall never take benefit of it, for the estate for life doth not determine before entry, and entry or re-entry in no case (by the common law) can be given to a stranger, 11 H. 7, 17 a, Br. Cond. 245; 10 E. 3, 52, *per* Stone; 21 H. 7, 12 a. So if a parson, vicar, or prebend, makes a lease for years, rendering rent, and dies, the successor accepts the rent, it is nothing worth, for the lease was void by his death, otherwise is it of a lease for life: but if a bishop, abbot, prior or such like, makes a lease for years and dies, if the successor accepts the rent, he shall never avoid the lease, for the lease was only voidable, 11 E. 3, Abbot, 9; 8 H. 5, 19; 37 H. 6 b; 24 H. 8, Br. Leases, 19; F. N. B. 50 C.

But note, reader, I conceive that in the case of a lease for life, if the lessor accepts the same rent which was demanded, he hath affirmed the lease, for he cannot receive it as due on any contract, as in the case of a lease for years, but he ought to receive it as his rent, and then he doth affirm the lease to continue; for when he accepted the rent, he could not have an action of debt for it, but his remedy then was by assize, if he had seisin, or by distress. And therefore I conceive in such case, the acceptance of the rent shall bar him of his re-entry; and it appears by Littleton, cap. Conditions, fol. 79 a, that in such case, if the lessor brings an assize for the rent, he relinquishes, and waives the benefit of his re-entry, although it be for the rent due at the same day; but if he re-enters first, then he may have an action of debt for the rent behind, 17 E. 3, 73; 18 E. 3, 10; 30 E. 3, 7; 38 E. 3, 10. And afterwards Mich. 39 and 40 Eliz. in the Common Pleas, which plea began Hil. 38 Eliz. Rot. 1302, in trespass between *March* and *Curtis*, for land in Essex, the like judgment was given by Anderson, Chief Justice there, Walmsley, Justice, and the whole court, where a lease for years was made, rendering rent, and with condition that if the lessee should assign his term, that the lessor might re-enter, and the lessee assigned his term, that although the lessor had accepted the rent

by the hands of the lessee, yet, forasmuch as the lessor had not notice of the assignment, the acceptance of the rent did not conclude him or his entry; so this point hath been adjudged by both courts. See for the said differences (which lie obscurely in our books) 45 Ass. 5, the *Case of Waste*, 22 H. 6, 57; 6 H. 7, 3 b; F. N. B. 120, 122; Plow. Com. *Browning and Beston's Case*, 133, 545; 14 Ass. 11; 40 E. 3, Entry Congeable, 41; 11 H. 7, 17; 10 E. 3, 52; 21 H. 7, 12; 21 H. 6, 24; 39 H. 6, 27; 26 H. 8.

And in these two cases many good cases and differences were taken, when acceptance of rent (or other things) shall bar him who accepts it of the arrearages of the rent, of re-entry, of action, or of execution, and the reason of the old books briefly reported, and in an obscure manner, well explained. If he who hath a rent-service or a rent-charge, accept the rent due at the last day, and thereof makes an acquittance, all the arrearages due before are thereby discharged: and so was it adjudged between *Hopkins* and *Morton* in the Common Pleas, Hil. Rot. 950, *vide* 10 Eliz. Dyer, 271, but there the case is left at large; and therewith agrees 11 H. 4, 24, and 1 H. 5, 7 b. But note, it appears by the said record of 10 El. that the bar to the avowry ought to be in such case, with conclusion of judgment, if against this deed of acquittance he ought to make avowry; so that it appears that the acquittance is the cause of the bar of estoppel in such case. For it appears by 8 Ass. pl. ult.; 9 E. 3, 9; 29 E. 3, 34, that if a man makes a lease for life rendering rent, or if there be lord and tenant by fealty and rent, and the rent is behind for two years; and afterwards the lessor, or the lord, disseises the ter-tenant, and afterwards the tenant recovers against him in assize, and the rent, which incurred during the disseisin is recouped in damages, yet the lord or lessor shall recover in the assize, the arrearages before the disseisin; and the bar of the latter years is no bar of the arrearages before. *Vide* 39 H. 6; Bar. 79, where the principal case of annuity may be good law, either because there the defendant pleaded the acquittance for the last day, and demanded judgment of action, where he ought to have relied upon the acquittance. Or because, in the case of annuity, he is not bound to pay the annuity without acquittance: but in the case of rent-service, or rent-charge, he who receives it is not compellable to make an acquittance, but the making thereof is his voluntary act, to which the law doth not compel him.

If there be lord and tenant, and the rent is behind, and the tenant makes a feoffment in fee, if the lord accepts the rent or service of the feoffee, he shall lose the arrearages in the time of the feoffor, although he makes no acquittance; for after such acceptance he shall not avow on the feoffor at all, nor on the feoffee, but for the services which incurred in his time, as appears in 4 E. 3, 22; 7 E. 3, 8; 7 E. 4, 27; 29 H. 8, Br. Avowry, 111. But in such case, if the feoffor dies, although the lord accepts the rent or service by the hand of the feoffee, he shall not lose the arrearages, for now the lord cannot avow on other, but

only on the feoffee: and that, to which the law compels a man, shall not prejudice him.

So, and for the same reason, if there be lord, mesne, and tenant, and the rent due by the mesne is behind, and afterwards the tenant doth forejudge the mesne, and the lord receives the services of the mesne, which now issue immediately out of the tenancy, yet he shall not be barred of the arrearages which issue out of the mesnalty: so, if the rent be behind, and the tenant dies, the acceptance of the services by the hands of the heir shall not bar him of the arrearages; for in these cases, although the person be altered, yet the lord doth accept the rent and services of him who only ought to do them; and all this appears in 4 E. 3, 22; 7 E. 3, 4; 7 E. 4, 27; 29 H. 8, Avowry Br. 111. But acceptance of rent or services by the hands of the feoffee shall not bar the lord of the relief before due, for relief is no service, but a fruit and approvement of services; for if it were part of the services, then an action of debt would not lie for it so long as the rent continues, but it is as a blossom of fruit fallen from the tree; and for relief, it is not necessary to avow on any person certain; and the book in 4 E. 3, 22, is to be intended, that the father made a feoffment in fee by collusion and died: and there it is held, that if the lord had accepted the services by the hands of the feoffee in the life of the father, he should lose his relief.

But note, reader, relief was not taken within the equity of the Statute of Marlebridge, as it is adjudged in 17 [27] E. 3, 63; but now it is remedied by the Statute of 32 and 34 H. 8 of Wills. But in the case before, the lord (before acceptance of the rent or service by the hands of the feoffee) might have avowed on the feoffee for all the arrearages incurred, as well in the time of the feoffor, as in the time of the feoffee, as it is in 7 H. 4, 14; 19 E. 2, Avowry, 222. And by what hath been said it appears, that the acceptance of homage or any other service of the heir, shall not bar the lord of relief. *Vid. temp.* E. 1, Relief, 13; 15 E. 3 *Ib.* 5; 16 E. 3 *Ib.* 10; 3 E. 2; Avow. 190.

And it was further said, that if there be lord and tenant by knight's service, and the tenant enfeoffs his son and heir apparent within age by collusion, if the lord accepts the services by the hands of the feoffee, he shall lose the wardship: but against that it was objected, —

1st. That the feoffee might compel the lord to avow on him, by giving notice and tendering the arrearages, and that which the law compels one to do, shall not prejudice or estop him.

2d. That acceptance doth not conclude before title accrued, and no title of wardship in this case was accrued to the lord at the time of the acceptance, but it accrued after the death of the feoffor.

As to the first it was answered, that the feoffee by no tender that he could make, could compel the lord to avow on him: for the lord might show, that the feoffment was by collusion, against the Statute of Marlebridge, *cap.* 6, and therefore he might maintain his avowry on the feoffor; for the law will not compel him to avow on the feoffee to his prejudice.

As to the second, it was answered, that the Statute of Marlebridge hath made such feoffment, made by collusion, as void and of no effect as to the lord: and, therefore, if the lord will affirm the feoffment, and waive the benefit of the Act, by accepting the feoffee for his tenant, he shall purge the collusion, and lose the wardship. And the reason of Prisot, 33 H. 6, 16, that such acceptance should not conclude the lord, was, because the feoffee in such case might compel the lord to avow on him, but that is not law, and against the opinion of Prisot, see 31 E. 3; Garde, 154; 33 E. 3, Garde, 33; F. N. B. 142. And now the doubt in 36 E. 3, Garde, 11, is well explained.[1]

DUMPOR'S CASE.

QUEEN'S BENCH. 1603.

[*Reported* 4 *Co.* 119 *b.*]

IN trespass between *Dumpor* and *Symms*, upon the general issue, the jurors gave a special verdict to this effect: the president and scholars of the College of Corpus Christi in Oxford, made a lease for years in *anno* 10 Eliz. of the land now in question, to one Bolde, proviso that the lessee or his assigns should not alien the premises to any person or persons, without the special license of the lessors. And afterwards the lessors by their deed *anno* 13 Eliz. licensed the lessee to alien or demise the land, or any part of it, to any person or persons *quibuscunque*. And afterwards, *anno* 15 Eliz. the lessee assigned the term to one Tubbe, who by his last will devised it to his son, and by the same will made his son executor, and died. The son entered generally, and the testator was not indebted to any person, and afterwards the son died intestate, and the ordinary committed administration to one who assigned the term to the defendant. The president and scholars, by warrant of attorney, entered for the condition broken, and made a lease to the plaintiff for twenty-one years, who entered upon the defendant, who re-entered, upon which re-entry this action of trespass was brought: and that upon the lease made to Bolde, the yearly rent of 33*s.* and 4*d.* was reserved, and upon the lease to the plaintiff, the yearly rent of 22*s.* was only reserved. And the jurors prayed upon all this matter the advice and discretion of the court, and upon this verdict judgment was given against the plaintiff. And in this case divers points were debated and resolved: First, That the alienation by license to Tubbe, had determined the condition, so that no alienation which he might afterwards make could break the proviso or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his

[1] The last part of the case is omitted.

assigns shall not alien, yet when the lessors license the lessee to alien, they shall never defeat by force of the said proviso, the term which is absolutely aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with all alienations after; for inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first condition: and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty. And therefore it was adjudged, Trin. 28 Eliz. Rot. 256 *in Com' Banco*, *inter Leeds and Crompton*, that where the Lord Stafford made a lease to three, upon condition that they or any of them should not alien without the assent of the lessor, and afterwards one aliened by his assent, and afterwards the other two without license, and it was adjudged that in this case the condition being determined as to one person (by the license of the lessor) was determined in all. And Popham, Chief Justice, denied the case in 16 Eliz. Dyer, 334. That if a man leases land upon condition that he shall not alien the land or any part of it, without the assent of the lessor, and afterwards he aliens part with the assent of the lessor, that he cannot alien the residue without the assent of the lessor: and conceived, that is not law, for he said the condition could not be divided or apportioned by the act of the parties; and in the same case, as to parcel which was aliened by the assent of the lessor, the condition is determined; for although the lessee aliens any part of the residue, the lessor shall not enter into the part aliened by license, and therefore the condition being determined in part, is determined in all. And, therefore, the Chief Justice said, he thought the said case was falsely printed, for he held clearly that it was not law. *Nota*, reader, *Paschæ* 14 Eliz. Rot. 1015 *in Com' Banco*, that where the lease was made by deed indented for twenty-one years of three manors, A. B. C. rendering rent, for A. £6, for B. £5, for C. £10, to be paid in a place out of the land, with a condition of re-entry into all the three manors, for default of payment of the said rents, or any of them, and afterwards the lessor by deed indented and enrolled, bargained and sold the reversion of one house and forty acres of land, parcel of the manor of A., to one and his heirs, and afterwards, by another deed indented and enrolled, bargained and sold all the residue to another and his heirs; and if the second bargainee should enter for the condition broken or not, was the question: and it was adjudged, that he should not enter for the condition broken, because the condition being entire, could not be apportioned by the act of the parties, but by the severance of part of the reversion, it is destroyed in all. But it was agreed, that a condition may be apportioned in two cases. 1. By act in law. 2. By act and wrong of the lessee. By act in law, as if a man seised of two acres, the one in fee, and the other in borough English, has issue two sons, and leases both acres for life

or years rendering rent with condition; the lessor dies, in this case by this descent, which is in act in the law, the reversion, rent, and condition are divided. 2. By act and wrong of the lessee, as if the lessee makes a feoffment of part, or commits waste in part, and the lessor enters for the forfeiture, or recovers the place wasted, there, the rent and condition shall be apportioned, for none shall take advantage of his own wrong, and the lessor shall not be prejudiced by the wrong of the lessee: and the Lord Dyer, then Chief Justice of the Common Pleas, in the same case, said, that he who enters for a condition broken, ought to be *in* of the same estate which he had at the time of the condition created, and *that* he cannot have, when he has departed with the reversion of part: and with that reason agrees Lit. 80 b. And *vide* 4 & 5 Ph. & Mar. Dyer, 152, where a proviso in an indenture of lease was, that the lessee, his executors or assigns, should not alien to any person without license of the lessor, but only to one of the sons of the lessee: the lessee died, his executor assigned it over to one of his sons, it is held by *Stamford and Catlyn*, that the son might alien to whom he pleased, without license, for the condition, as to the son, was determined, which agrees with the resolution of the principal point in the case at bar. 2. It was resolved, that the Statutes of 13 Eliz. *cap.* 10 and 18 Eliz. *cap.* 11, concerning leases made by deans and chapters, colleges, and other ecclesiastical persons, are general laws whereof the court ought to take knowledge, although they are not found by the jurors; and so it was resolved between *Claypole and Carter* in a writ of error in the King's Bench.[1]

GOODRIGHT d. WALTER *v.* DAVIDS.

KING'S BENCH. 1778.

[*Reported Cowp.* 803.]

In ejectment, the following case was reserved for the opinion of this court. The plaintiff declared on a demise from Philip Walter, dated the 30th of September, 1776, to hold from the 29th of September then last, for ten years. At the trial of the cause, before *Mr. Serjeant Sayer*, at the last Lent Assizes, at Maidstone, for the county of Kent, it appeared, that the lessor of the plaintiff, by indenture of the 26th of July, 1762, demised the premises to the defendant for forty-one years, if he the said Walter, the lessor, should so long continue rector of the parish of Crayford. Among other things contained in the said indenture, there was a covenant that the defendant should *not underlet*, assign or transfer the premises, or any part thereof, *without* the *consent* of the said *lessor* in writing, *under* his *hand and seal* first had and obtained; with a power of *re-entry* to the said Walter, in case the defendant should not observe the covenants in the said lease. It further appeared, by

[1] See 7 Am. Law Rev. 616 (1873).

receipts produced and parol evidence, that the defendants had underlet various parts of the premises in question, to several tenants for some years; but that the plaintiff's lessor knew of such underlettings, all which were *previous* to Michaelmas, 1775. The last receipt for rent paid by the defendant was dated March 25, 1777, "for rent due to the plaintiff's lessor at Michaelmas preceding." The underletting to Mrs. Ware, an under-tenant to the said defendant, was before Michaelmas, 1775, and continued at the time of the ejectment brought. A verdict was found for the plaintiff, subject to the opinion of the court on the following questions: Whether a forfeiture was incurred by the underletting; and if it were, whether the same were waived by, or under the circumstances aforesaid.

Mr. Morgan, for the lessor of the plaintiff.

Mr. Thornton, contra.

Lord Mansfield. This case is extremely clear: to construe this acceptance of rent *due since the condition broken*, a *waiver* of the forfeiture, is to construe it according to the intention of the parties. Upon the breach of the condition, the landlord had a right to enter. He had full notice of the breach, and does not take advantage of it, but accepts rent subsequently accrued. That shows he meant the lease should continue. Cases of forfeiture are not favored in law; and where the forfeiture is once waived, the court will not assist it. The consequence is, that there must be judgment for the plaintiff.

BRUMMELL *v.* MACPHERSON.

Chancery. 1807.

[*Reported* 14 *Ves.* 173.]

An exception was taken to the Master's report, in favor of the title; on the ground, that part of the estate purchased consisted of premises, held by lease, granted in 1779 by Winchcombe Henry Hartley to James Petit Andrews for 99 years; in which lease is contained a clause, proviso, or power, of re-entry by the lessor in case of any assignment of the premises being made by the lessee or assignee without the license and consent of the said Winchcombe Henry Hartley, his heirs or assigns, for that purpose previously obtained in writing: that the premises were duly assigned by Andrews, with the consent of Hartley, by indorsement on the original lease to William Brummell, the testator (under whom the plaintiffs claimed), his executors, administrators and assigns, subject to the payment of the rents and performance of the covenants, in the said indenture of lease reserved and contained on the tenant's or lessee's part to be paid, done, and performed; that application had been made to the devisees of Hartley, on the part of the vendors for a license for their assigning the lease to John Bebb, the purchaser, taking the exception; which was refused;

and therefore the Master ought to have reported, that a good title could not be made without the vendor's obtaining such license.

The proviso was, that if the rent should be unpaid for 21 days, "or in case of breach or non-performance of all or any or either of the covenants and agreements herein contained on the part and behalf of the said James Petit Andrews, his executors, administrators or assigns, to be kept, done and performed, or if the said James Petit Andrews, his executors, administrators or assigns, do or shall at any time hereafter assign, transfer and set over, or otherwise convey or dispose of this present indenture of lease or the term and premises hereby granted and demised or any part thereof without the license and consent of the said Winchcombe Henry Hartley, his heirs or assigns, for that purpose first had and obtained in writing under his or their hand or hands, that then and from thenceforth" it shall be lawful to Hartley, his heirs or assigns, to re-enter.

Sir Samuel Romilly and *Mr. Girdlestone*, in support of the exception.

Sir Arthur Piggott, for the report.

The Lord Chancellor [Lord Eldon]. I would not refuse a case upon this question: but my own opinion is, that this assignment may be made without license. Though *Dumpor's Case* always struck me as extraordinary, it is the law of the land at this day. When a man demises to A., his executors, administrators or assigns, with an agreement, that, if he, his executors, administrators or assigns, assign without license, the lessor shall be at liberty to re-enter, it would have been perfectly reasonable originally to say, a license granted was not a dispensation with the condition; the assignee being by the very terms of the original contract restrained as much as the original lessee; and the answer that has been given in support of the distinction contended for in this case, is not satisfactory; for, though the license may be to assign generally, *quibuscunque*, yet, when the choice is determined, the individual selected becomes the assign; and the original lease imposes the prohibition upon the assign as well as upon the original lessee. But the case in Dyer (Dy. 152, pl. 7) is a more direct answer to the distinction, upon which this exception goes. That is a very strong case: the original contract containing an express prohibition against assignment without license either by the lessee or his assigns; but in that original contract the case is contemplated, that it may be lawful for the son of the lessee to be the assign; and yet, when that son became the assign, it was held, that the condition was gone; and that he was in possession not subject to the condition. That lessee had not the whole world to select from: the original contract supposing, that the son might be the assign. My opinion, therefore, without considering the particular terms of the assignment, is, that this assignee has the power of assigning without license.

A case not being desired, the exception was overruled.[1]

[1] In *Pennock* v. *Lyons*, 118 Mass. 92 (1875), it appears from the papers in the case that the condition was against assignment by the lessee, and not against assignment by the lessee and his assigns. — Ed.

DOE d. BOSCAWEN *v.* BLISS.

COMMON PLEAS. 1813.

[*Reported* 4 *Taunt.* 735.]

Best, Serjeant, had obtained, in Michaelmas Term, 1812, a rule *nisi* to set aside the verdict found for the plaintiff in this ejectment, and have a new trial, under the circumstances, that this was an action brought by a landlord against his tenant, on a forfeiture incurred under a covenant contained in his lease, that he should not sell, assign, make over, underlet or encumber that indenture of lease, or the premises thereby demised. The evidence was that a house on the farm had been underlet year after year by the tenant, with the knowledge of the landlord, who nevertheless received the rent after it, and Best urged, that after the condition broken by the first underletting and the forfeiture once waived, the condition was gone forever, and he cited *Dumpor's Case*, 4 Co. Rep. 119. [MANSFIELD, C. J., and HEATH, J., agreed, that no doubt that case was the law, but inquired whether there were any license here; and whether it was contended that the landlord, having never before exercised his right to turn out the lessee, that indulgence was equivalent to an actual license?] Best admitted he carried his argument to that extent.

The court granted a rule *nisi*.

On this day, *Shepherd*, Serjeant, would have shown cause against the rule, but was stopped by the court.

MANSFIELD, C. J. Certainly the profession have always wondered at *Dumpor's Case*, but it has been law so many centuries that we cannot now reverse it. It does not however embrace the present case.

GIBBS, J. This is a question whether the landlord, by overlooking a former underletting, has waived the right of re-entry for a subsequent underletting. That is too strong a proposition, I think, to be made much of. For on that principle, if a landlord once knew that his premises were out of repair, and did not sue instantly, he could never after re-enter for a breach of covenant committed by their not being repaired. I suppose the defendant relies on *Dumpor's Case*, and infers that this tolerance is tantamount to a license, but this is too strong a proposition: we may therefore dispose of this case without further argument.

Rule discharged.[1]

[1] See *Bleecker* v. *Smith*, 13 Wend. 530 (1835).

DOE d. AMBLER *v.* WOODBRIDGE.

KING'S BENCH. 1829.

[*Reported* 9 *B. & C.* 376.]

EJECTMENT for a house in the city of London. Plea, Not guilty. At the trial before *Lord Tenterden*, C. J., at the London sittings after Hilary Term, it appeared that the lessor of the plaintiff was owner of the house in question, which the defendant occupied under a lease, containing a covenant that the tenant should not alter, convert, or *use* the rooms thereof then used as bed-rooms, or either of them, into or for any other use or purpose than bed or sitting rooms, for the occupation of himself, his executors, &c., or his or their family, without the license of the lessor in writing; and the lease contained a clause of forfeiture for breach of any covenant. The defendant had let part of the house to a lodger, who occupied up to the time of the trial the rooms specified in the covenant above set out; but the lessor had, after he knew of such occupation, received rent under the lease: and the only question was, Whether by so doing he had waived the forfeiture? Lord Tenterden, C. J., thought there was a continuing breach as long as the rooms were occupied contrary to the covenant, and directed the jury to find for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

Denman now moved accordingly, and contended, that the receipt of rent by the landlord was a waiver of the forfeiture. In *Doe* v. *Allen*, 3 Taunt. 78, ejectment was brought for a forfeiture incurred by carrying on a trade prohibited by the lease. The defendant could not prove any payment of rent after the business was commenced, but it appears to have been admitted by the court that such proof would have been an answer to the action. In *Doe* v. *Banks*, 4 B. & A. 401, the payment of rent was held not to be a waiver, because the breach of covenant, which consisted in ceasing to work a coal-mine for a certain period, was not complete at the time of the payment.

PER CURIAM. The conversion of a house into a shop, is a breach complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent. But this covenant is, that the rooms shall not be used for certain purposes. There was, therefore, a new breach of covenant every day during the time that they were so used, of which the landlord might take advantage; and the verdict, which proceeded on the particular words of this covenant, was right.

Rule refused.[1]

[1] Cf. *Crocker* v. *Old South Society*, 106 Mass. 489 (1871).

DOE d. FLOWER *v.* PECK.

KING'S BENCH. 1830.

[*Reported* 1 *B. & Ad.* 428.]

PARKE, J.[1] This was the case of an ejectment brought by Sir Charles Flower against the defendant, his tenant, upon an alleged forfeiture for breach of covenant. The cause was tried before the Lord Chief Justice of the Common Pleas, at the last assizes for the county of Hertford; when a verdict was given, by direction of the learned judge, for the plaintiff. A rule *nisi* was granted for a new trial: cause was shown at the sittings before the present term before my Brother BAYLEY, my Brother LITTLEDALE, and myself, and we are all of opinion that the direction of the Lord Chief Justice was right, and that the rule ought to be discharged.

It appeared that Sir Charles Flower demised the farm in question to one Ward, by a lease which contained, amongst others, a covenant by Ward, that he, his executors, administrators, and assigns, would insure the buildings in the Phœnix Insurance Office, and keep them insured during the term, and also would deposit the policy of insurance with Sir Charles Flower; and there was a proviso for re-entry, for breach of any of the covenants contained in the lease. Ward assigned to Eales, Eales to the defendant in October, 1828, both with the consent of the lessor, in writing; rent became in arrear from the defendant on the 29th of September, 1829, and the lessor of the plaintiff distrained for it on the 30th. At the time of making the distress, he had full knowledge that no insurance had been effected by Ward, or his assigns, according to the covenant. The demise was laid on the 11th of October, and the question was, Whether the lessor of the plaintiff was entitled to recover the estate against the assignee, the defendant, for the forfeiture by the breach of the covenant to insure.

A lessor has a right to make the estate of his lessee conditional, and the assignee of such an estate takes it subject to the condition, and liable to be divested by the breach of it. It is immaterial in this respect, and in this case in which the lessor, and not the assignee of the reversion, is the real plaintiff, whether the condition is for the performance of some covenant which touches the land, and runs with it, or one which is wholly collateral. Upon the breach of either species of covenant, the estate ceases when the lessor chooses to take advantage of his right of re-entry.

The estate is in this case granted to the lessee, upon condition that if either he or any of his assigns break the covenant to keep the premises insured, the lessor may re-enter. It is of no importance to consider whether the assignee was bound, in that character, by the cove-

[1] The opinion only is here given.

nant, so as to be liable to *an action* for the breach of it: it is enough, that if the covenant is not performed by the lessee or his assigns, the estate may be defeated by the lessor.

It is admitted that the covenant has not been performed: the lessor of the plaintiff might, therefore, avail himself of the right to re-enter for the forfeiture by that breach, if he has not precluded himself by having waived it.

There is no doubt that the distress on the 30th of September was an acknowledgment of the tenancy of the defendant, and, consequently, a waiver of the forfeiture for part of the term during which the premises were uninsured. Whether it was an entire waiver depends upon the construction of the covenant to insure. That covenant was in the following words: "And he the said William Ward, his executors, administrators, and assigns, shall and will insure and keep insured the said farm and buildings in the Phœnix Insurance Office, London, in the joint names of the said Sir Charles Flower, his heirs or assigns, and the said W. Ward, his executors, administrators, or assigns, during the said term, to the full amount or value thereof, and lodge the policy of such insurance with the said Sir Charles Flower, his heirs or assigns."

If this could be construed to be a covenant by the lessee to effect *one* policy of assurance immediately, and afterwards that he and his assigns should keep that particular policy on foot, by continuing to pay the annual premiums on that policy, the assignee would not have been guilty of any breach of covenant, if the lessee had never insured, for the policy never could have existed, which the assignee was to continue; and the distress for rent would have been a waiver of the breach by the original lessee. In such a case the lessor of the plaintiff could not have recovered.

But if the covenant mean that the lessee and his assigns shall always keep the premises insured by some policy or another, then it is broken if they are uninsured at any one time; there is a continuing breach for any portion of time that they remain uninsured; and we are of opinion that this is the true construction of the covenant: it is that which would have been put upon it if an action of covenant had been brought; and it makes no difference that the consequence of the breach of it is a forfeiture.

It follows that there was a breach of covenant by the lessee and the defendant suffering the demised premises to be uninsured between the 30th of September and the 11th of October; and of that breach of covenant the previous distress on the former day cannot possibly be a waiver.

For these reasons we are of opinion that the verdict was right, and the rule for entering a nonsuit must be discharged.

Rule discharged.

Turner, showed cause.
Thesiger, contra.

JONES *v.* CARTER.

EXCHEQUER. 1846.

[*Reported* 15 *M.* & *W.* 718.]

PARKE, B.[1] This was an action of covenant on a mining lease, in which breaches were assigned, the first for non-payment of rent, and others for different violations of covenants relative to mining. The principal question related to the rent. By the lease, it was to be paid half-yearly in advance, on the 25th of March and the 29th of September. The rent due on the 25th of March, 1845, was paid on that day. On the 19th of May the plaintiff brought an ejectment for breach of covenant, the lease containing a stipulation that for any breach of covenant, it should "determine and be utterly void." Some of the breaches of covenant declared upon were clearly proved to have been committed prior to the bringing of the ejectment. The notice, in the action of ejectment, was to appear in Trinity Term, and no doubt a consent-rule was entered into in or after that term. The plea to the ejectment was afterwards abandoned: but it does not appear by the learned judge's note that possession was actually taken by the plaintiff.

Under these circumstances, the question which was brought before us for consideration was, whether the lease was put an end to before the 29th of September, 1845, when the half-year's rent became due. We are all of opinion that it was.

Though the lease is declared to be *void* for breach of covenant, it is perfectly well settled that the true construction of the proviso is, that it shall be void *at the option* of the lessor; *Rede* v. *Farr*, 6 M. & Selw. 121; *Doe* v. *Banks*, 4 B. & Ald. 401, and other cases; and consequently, on the one hand, if the lessor exercises the option that it shall continue, the lease is rendered valid; if he elect that it shall end, the lease must be determined. In the cases above referred to, the option was held to have been exercised by the receipt of rent subsequently due, and the lease thereby rendered valid. In like manner, the lease would be rendered invalid by some unequivocal act, indicating the intention of the lessor to avail himself of the option given to him, and notified to the lessee, after which he could no longer consider himself bound to perform the other covenants in the lease; and if once rendered *void*, it could not again be set up. An entry or ejectment, in which an entry is admitted, would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocally indicating the intention of the lessor would be sufficient to determine this lease, which is made *void* at the option of the lessor, we need not determine, because an ejectment was brought, and pro-

[1] The opinion only is here given.

ceeded with to the consent-rule, by which the defendant admitted an entry, and the entry would certainly be an exercise of the option; and, once determined, the lease could not be revived.

It was said there was no authority upon the point now under consideration; but there is a case at Nisi Prius materially bearing upon it, in which Lord Tenterden expressed a clear opinion that the receipt of rent after *an ejectment brought for a forfeiture* was no waiver of such forfeiture: *Doe d. Morecraft* v. *Meux*, 1 C. & P. 848. A case was desired, but we cannot find that any was argued. We entirely agree in Lord Tenterden's opinion. The precise point that he decided was, that on the trial of an ejectment for a forfeiture (in which of course the *entry* was admitted), the receipt of rent after the bringing of that ejectment was too late, and the lease was not rendered valid. We think the same consequence follows from an entry admitted by the consent-rule; but even supposing no consent-rule to have been entered into, we think that the bringing of an ejectment for a forfeiture, and serving it on the lessee in possession, must be considered as the exercise of the lessor's option to determine the lease; and the option must be exercised once for all. Without inquiring whether an ejectment be a real action, the bringing of which and the counting in which would, according to the authority of Lord Coke, be a determination of an election between two remedies, it seems to us that so distinct and unequivocal an act must, independently of any technical reason, be a final determination of the landlord's option; for after such an act, by which the lessor treats the lessee as a trespasser, the lessee would know that he was no longer to consider himself as holding under the lease, and bound to perform the covenants contained in it; and it would be unjust to permit the landlord again to change his mind, and hold the tenant responsible for the breach of duty, after that time.

We are all, therefore, of opinion that the lease was determined in May, 1845, and consequently the defendant was not liable to pay the subsequent rent, or damages for any subsequent breach of covenant. There is no reason, therefore, for a new trial as to the issue on the rent being in arrear.

With respect to the remainder, the verdict was clearly wrong, and there must be a new trial, unless the defendant will consent that a verdict be entered for the plaintiff with nominal damages, subject to the same discretion as Mr. Justice Williams would have had at the trial, to certify to deprive the plaintiff of costs.

Rule accordingly.[1]

W. Yardley and *Unthank*, showed cause.

Welsby (*Jervis* with him), *contra.*

[1] Cf. *Green's Case*, Cro. El. 3 (1582); *Grimwood* v. *Moss*, L. R. 7 C. P. 360 (1872); *Toleman* v. *Portbury*, L. R. 6 Q. B. 245; L. R. 7 Q. B. 344 (1872). So bringing an action for rent accruing after breach of condition is waiver of the right of re-entry. *Dendy* v. *Nicholl*, 4 C. B. N. S. 376 (1858).

DOE d. BAKER *v.* JONES.

EXCHEQUER. 1850.

[*Reported* 5 *Exch.* 498.]

THIS was an action of ejectment to recover the possession of certain premises, situate in Chapel Street, Edgeware Road, on a forfeiture by breach of covenant in not repairing. The cause came on for trial before *Pollock*, C. B., at the Middlesex sittings after Michaelmas Term, 1848; when a verdict was taken by consent for the lessors of the plaintiff, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the said parties and one R. Darch, who agreed to become a party to the submission, were referred. The arbitrator awarded (*inter alia*) as follows: "I find that, by a building lease, being an indenture dated the 1st of July, 1803, and made between J. Buck, of the first part; J. Stephens and D. Bullock, of the second part; J. Ward, of the third part; J. Walton, of the fourth part; and E. Welch, of the fifth part; the said parties of the first, second, third, and fourth parts, did demise to the said E. Welch the land sought to be recovered in this action, for ninety-nine years, from Christmas, 1792, at the rent therein mentioned; and if the lessees should at any time use the premises, or any part thereof, for any manufactory save as a floor-cloth manufactory as then used, or for any trade or business whatsoever, without the license in writing under the hands of the lessors, then yielding and paying, for the residue then to come of the said term, over and above the rent thereinbefore reserved, the monthly rent of £50. The lease contained a covenant by the lessee, for himself and his assigns, that he and his assigns would, at their own cost and charges, well and sufficiently repair, uphold, support, sustain, maintain, tile, slate, lead, paint, pave, purge, scour, cleanse, empty, amend, and keep the same premises, and every part thereof, with all and all manner of needful and necessary reparations and amendments whatsoever, when and so often as need or occasion should require, during all the said term; and a proviso, that in case of breach or non-performance or non-observance of any of the covenants, clauses, or agreements in the lease, the lessors might enter and put an end to the term. I find that the reversion in fee, expectant on the termination of the said term, became vested in the lessors of the plaintiff prior to September, 1846, and has so continued vested to the present time. In that month one R. Darch, who proposed to become tenant of the premises, went over them with R. Cantwell, a surveyor, on behalf of the lessors of the plaintiff, and pointed out to him certain alterations he wished to make therein, which consisted in moving certain outbuildings, and making excavations for saw-pits and veneer-pits. On the 12th of October, 1846, the lessors of the plaintiff signed a memo-

randum, directed to J. Welch, or other the tenants of the premises, whereby they gave full license and authority to carry on the trade or business of a timber-merchant on the premises, adding the words, "provided that any alterations therein or thereto be made to the satisfaction of our surveyor, Mr. Robert Cantwell, testified by writing under his hand." On the 18th of March, 1847, the residue of the term was assigned to the defendant, D. Jones, and on the 3d of April in that year he paid the rent due under the lease up to the 25th of the preceding March. For a long time before and at the time of this payment, the whole of the premises were out of repair, owing to the neglect of the lessees to perform their covenant to repair. Part of the out-buildings, consisting of a shed, stable, and cow-house, were in such a state of dilapidation that they could not be repaired, and it was necessary that they should be taken down and rebuilt. Shortly after this payment of the rent, R. Darch, who at that time had become tenant of the premises under the defendant, D. Jones, proceeded to (and in fact did) pull down all the last-mentioned out-buildings, and made certain excavations in a yard, part of the ground demised. He so acted with a *bona fide* intention of re-erecting the out-buildings, and also intended to use part of the space excavated as saw-pits, and the rest for veneer-pits, both required in his trade of a timber merchant. On the 21st of October, 1847, the declaration in ejectment was served. At this time, the principal building, formerly used as a floor-cloth manufactory, had not been properly repaired, part of the out-buildings had been re-erected, and part had not been rebuilt, and the excavation before mentioned was in progress. Immediately after the service of the declaration in ejectment, the excavation was stayed, and the pit that had been dug was filled up. Upon this state of facts, it was contended by the lessors of the plaintiff, that a breach of covenant had been committed in pulling down the out-buildings, in general neglect to repair, and in making the excavations. On the part of the defendant it was contended, that the lease was to be considered as subsisting on the 25th of March, 1847, in consequence of the receipt of the rent up to that day; and that, looking at the state of the premises at that time, the lessee was to be allowed a reasonable time to pull down and rebuild the out-buildings, and generally to repair the whole premises. And as to the excavations, the defendant contended, that he was justified in making them by virtue of the lease, and under the circumstances stated. For the purposes of disposing of the action of ejectment, I do award and determine, that, looking at the state of the premises on the 25th of March, 1847, if the lessees were entitled by law to a reasonable time from that day to put the premises in repair, such reasonable time had not elapsed when the declaration in ejectment was served. But I award and determine, that it was the duty of the lessee, from time to time, to repair the premises pursuant to the covenant, and that any reasonable time for so repairing must date from the time each particular reparation was required. And I also award and determine, that

the lessors of the plaintiff had a right to re-enter on the day the declaration in ejectment was served, and that the verdict found by the jury is to stand."

A rule had been obtained, calling on the lessors of the plaintiff to show cause why the award should not be referred back to the arbitrator, as far as it related to the action of ejectment; against which rule —

Martin and *Cowling* now showed cause.

Hayes, in support of the rule.

Pollock, C. B. The rule must be discharged. The question is, whether the action of ejectment is properly disposed of by this finding: "I do award and determine, that, looking at the state of the premises on the 25th of March, 1847, if the lessee were entitled by law to a reasonable time from that day to put the premises in repair, such reasonable time had not elapsed when the declaration in ejectment was served. But I award and determine that it was the duty of the lessee from time to time to repair the premises, pursuant to the covenant, and that any reasonable time for so repairing must date from the time each particular reparation was required." That appears to me to be the correct rule of law, and we cannot lay it down that a new time for reparation commences after each receipt of rent. There may be a considerable distinction between the case of an actual breach before the receipt of rent, the reasonable time having elapsed, and where the reasonable time is still running, because in the latter case there is no breach to waive, but in the former there is some ground for saying that the acceptance of rent is a waiver of the forfeiture actually incurred. However, I do not mean to express an opinion in favor of the proposition which Mr. Hayes has contended for, and, I must own, not without some show of reason; it is sufficient to say, that, upon the present award and finding, the question must be decided in favor of the lessors of the plaintiff, unless, as a matter of law, the lessees were entitled to a reasonable time for reparation after the rent received became due, which I think they were not.

Alderson, B. I do not feel the same difficulty as the Lord Chief Baron. The receipt of rent is a waiver of all forfeitures, which are, so to speak, single and complete, and are not in the nature of continuing forfeitures. So with respect to continuing forfeitures, where the lessee is bound from time to time to keep the premises in repair, and he omits for an unreasonable time, but afterwards repairs them, there the receipt of rent waives the previous forfeiture. But where the matter is plainly a continuing breach, the only question is, whether, when the party seeks to re-enter, the premises have been an unreasonable time out of repair and so continue.

Rolfe, B. I am of the same opinion. If instead of "a reasonable time," the lease had named five days, within which the lessee was to repair, there could have been no difficulty, because the five days had elapsed on the 25th March, 1847: the receipt of rent would have been

a waiver of the actual breach, but it would have been no waiver of a neglect to repair between the 21st and 25th, for then there was no complete breach.

PLATT, B. It is a fallacy to say that the receipt of rent was a waiver of the breach of contract to repair, for it was a continuing breach, and until the repairs were perfected, the lessors of the plaintiff were entitled to re-enter for the forfeiture.

Rule discharged.

PRICE *v.* WORWOOD.

EXCHEQUER. 1859.

[*Reported* 4 *H.* & *N.* 512.]

EJECTMENT. The writ was dated the 24th of December, 1858. At the trial, before *Channell*, B., at the sittings in Middlesex after Hilary Term, it appeared that the action was brought to recover possession of three houses in Hyde Place, Hoxton, held by the defendant under a lease dated in August, 1852, at the rent of £3 10*s.* a year. The lease, which was in the short form given by the 8 & 9 Vict. *c.* 124, Schedules 1, 2, contained covenants by the lessee to pay rent and insure in the joint names of the lessor and lessee, and produce receipts for the premiums, with a proviso for re-entry on non-payment of the rent or non-performance of the covenants. Rent being in arrear, the plaintiff, in October, 1858, applied for payment. The defendant said he could not pay. The plaintiff then attempted to distrain, but could not get into the premises. After sunset on the 4th of November he entered the ground floor, where he saw only a few fixtures and some furniture of small value, not sufficient to cover the rent. The plaintiff stated that, a year and a half before the action, he had spoken to the defendant about the insurance. The defendant said he had not insured, and promised to do so. The plaintiff said, "Get it done, and show me the policy." The plaintiff mentioned the Alliance Fire Office. About a year afterwards the plaintiff again spoke to the defendant on the subject, when the defendant admitted that the premises were uninsured, and stated that he wanted the money for other purposes. On the 23d of December, 1858, the plaintiff received £3 10*s.* from two of the under-tenants of the premises, and gave receipts "in part payment of rent due to me at Michaelmas, 1858." The plaintiff had inquired at the Alliance Office and had given notice to the defendant to produce the policy at the trial. The policy was called for, but not produced.

Upon these facts, the defendant's counsel submitted that there was no evidence to go to the jury; but the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict if the court should be of opinion that there was no evidence to be submitted to the jury.

Hawkins, in Easter Term, having obtained a rule *nisi* to set aside the verdict and to enter a nonsuit or verdict for the defendant, on the ground that there was no evidence for the jury to support the plaintiff's case,

Pigott, Serjt., and *Pearce*, showed cause.

Hawkins and *Doyle*, in support of the rule.

Cur. adv. vult.

The following judgments were now pronounced : —

Pollock, C. B. We are of opinion that there was evidence to go to the jury that the premises were uninsured. My Brother Channell, who tried the cause, doubted whether there was evidence, but reserved the point for Mr. Hawkins, saying, he should like to take the opinion of the jury, and asked him if he would address the jury. Mr. Hawkins declined, and preferred making an application to the court on leave reserved. The jury found for the plaintiff in the ejectment, on the ground that they were satisfied that the premises had not been insured ; and, looking at the nature of the evidence, in effect it was this : that twice over the tenant had declared that he had not insured the premises on account of his inability to do so ; again, he had been told to insure, and to show the document when he obtained it to the landlord, which he had failed to do, and therefore, at the time these declarations were made, there was distinct evidence that there had been no insurance. There was no evidence or anything to lead to the inference that there had been an insurance afterwards, except this, that the rent had, in some measure, been paid. But, looking at the opinion of Lord Coke (Co. Lit. 211 b), as to the effect of the mere payment of this rent, it is not to be considered equivalent to a distress. An actual distress is so clear an affirmance of the tenancy existing at the time that it does away with all previous forfeitures. It is an acknowledgment of such a character that the landlord cannot afterwards say, " You are not my tenant." In this case the rent had been received from an under-tenant ; and it was said, as it could not have been recovered as a debt, but only by putting a distress upon the premises, that ought to have the same effect. We think we ought not to go so far as that. If the landlord had been constrained to put in a distress, and had actually distrained, such would have been the result ; but, inasmuch as he did not distrain, I think we ought not to carry the case beyond the point to which the decisions have already extended. It seems to me that the receipt of rent from an under-tenant is not to be considered as having the same effect as a distress would have had. When a landlord goes on the premises and finds that rent is due from an under-tenant who is not unwilling to pay it, and the payment by whom to him, as the superior landlord, would be a payment to his tenant, there is good sense in holding that such payment is not equivalent to a distress ; because it amounts to no more than going and asking for the rent, and finding persons willing to pay the money, and taking it.

MARTIN, B. I am of the same opinion. A receipt of rent, to operate as a waiver of a forfeiture, must be a receipt of rent due on a day after the forfeiture was incurred. The mere receipt of the money, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt. I entirely agree with what my Lord has said. We ought to endeavor not to allow technical consequences to be given to acts which were never intended to follow from them. I believe the rule laid down by Lord Coke is the correct one. Even if that were not so, in this case there would be a good right to maintain the ejectment, for the non-insurance is a continuing breach, and its continuance during the period between the time of the payment of the rent on the 23d of December and the commencement of the suit on the 24th is sufficient for the purpose of entitling the plaintiff to his verdict.

CHANNELL, B. I also agree in thinking that the rule should be discharged. This is an action of ejectment, and the writ was tested the 24th December last year. The plaintiff sought to recover in respect of one or other of two breaches of covenant; and, in order to entitle him to recover, it was necessary for him to show a right to enter on the premises on the 24th December. The case turns on the breach of covenant for non-insurance. Now, to entitle the plaintiff to recover in respect of that, it is necessary for him to show that the premises were uninsured on 24th December, 1857, and uninsured under circumstances which entitled him to take advantage of the forfeiture. Certainly, at the trial, I had some doubt whether there was any evidence of non-insurance on the 24th December of which the plaintiff could take advantage; my doubt being, if there had been some evidence to go to the jury of non-insurance during a considerable time, whether it had not been waived by what occurred on the 23d December. Then, first, was there any evidence to show a continuing breach? More than a year before the action was brought the defendant had been asked if he had insured, and was requested to produce his policy; he said that he had not insured. He was applied to again in the same year in which the action was brought, and he then not only stated that he was uninsured, but gave a reason, namely, that he wanted the money for other purposes. So far as we can judge, that which he gave as a reason for not insuring, viz., the want of funds, was a continuing cause, and, from what had taken place with respect to the non-payment of the rent, may be supposed to have continued. I therefore think there was evidence to go to the jury, not merely that the premises were not insured at the time that an application was made to the defendant upon the subject of the non-insurance, but that the same state of things continued afterwards. Then, supposing that to be so, was the forfeiture waived by what occurred on the 23d? Now, on the 23d December, the day before the action was brought, the plaintiff obtained from the under-tenants payment of the rent due from them to their landlord, the present defendant,

up to the preceding Michaelmas. Without entering into the question whether that is to place the plaintiff in a worse situation than if he had received it from his tenant; in other words, whether it is only evidence of a waiver of the forfeiture before the Michaelmas up to which rent was paid, or whether it brings the waiver down to the 23d December; still, if I and the rest of the court are right in our conclusion, there was evidence of a continuing breach between the 23d, when the payment was made, and the time when the action was brought on the 24th. We have only to consider whether there was any evidence to go to the jury. I am of opinion that there was, and that the rule should be discharged.

Rule discharged.

DAVENPORT *v.* THE QUEEN.

PRIVY COUNCIL. 1877.

[*Reported* 3 *Ap. Cas.* 115.]

APPEAL[1] from an order of the Supreme Court of Queensland, discharging a rule to set aside a verdict found for her Majesty, and to enter a nonsuit or a verdict for Davenport, or for a new trial in an action of ejectment brought in the name of her Majesty, on the fiat of her Attorney-General for Queensland, to recover land in the Darling Downs District in Queensland.

In 1868 her Majesty leased a tract of land to one Meyer for a term of eight years, from September 23, 1867. The rent was to be paid annually in advance, and on payment of the last year's rent the lessee was entitled to a deed of the land in fee. Meyer transferred the lease to Davenport, the appellant, in June, 1869, and Davenport to D'Abedyll in 1870. Davenport was in possession as tenant to D'Abedyll when this suit was brought.

Meyer failed to cultivate or improve the demised premises within a year from the date of the lease. The first question which arose was whether this failure, under the provisions of the lease, made the lease either voidable at the option of the Crown, or absolutely void, and if so, which. The Privy Council was of opinion that the lease was voidable at the option of the Crown. This part of the case is omitted.

Mr. Benjamin, Q. C., and *Mr. J. D. Wood* (*Mr. Davenport* with them), for the appellant.

Sir Hardinge Giffard, S. G., and *Mr. Kekewich*, Q. C. (*Mr. C. Bowen* with them), for the respondent.

SIR MONTAGUE E. SMITH. . . . The principal facts are undisputed. The rent payable on the 1st of January, 1869, was duly paid into the colonial treasury, but there being no evidence that the Crown was then made aware of the non-improvement, nothing turns upon this payment.

[1] Only part of the case is given, and the following short statement is substituted for that in the report.

However, on the 1st of February in that year the surveyor of the Darling Down district, who had been directed by the Surveyor-General to examine the allotments which had been leased, made a report in which he stated that no cultivation or improvement had been made, among others, in the allotment in question. A copy of this report was sent in the month of June following by the Surveyor-General to Mr. Taylor, the Minister for Lands of the colony. Mr. Taylor, who was examined at the trial, deposed that having made himself acquainted with the report, he laid it before his colleagues in the ministry, and that the result of their deliberations was a determination not to proceed for the forfeiture of the allotments, but to allow the future rents to be paid. Mr. Taylor says he thereupon told the Surveyor-General to take no action on this report, adding, "we could not afford it."

Accordingly, Mr. D'Abedyll paid the subsequent yearly rents in advance as they became due, viz., on the 1st of January in the years 1870, 1871, and 1872; and on the 31st of May, 1873, he paid in advance the whole of the remaining rent accruing under the lease. He paid at the same time the fees chargeable on the issue of deeds of grant.

It is not denied that the Minister for Lands was made acquainted with these payments, nor that they were paid "as rent;" and it cannot be doubted that the minister knew they were so paid.

Two receipts given by the local land agent were produced, in which the payments are described as "rents."

On the 23d of December, 1869, a notice headed "Payment of Rents under the Leasing Act, 1866," was published in the Gazette. After giving notice to lessees living at a distance from Brisbane that the local land agents had been instructed to receive "the rents," it contains the following note: —

"The accompanying schedule contains all selections made under the Leasing Act of 1866, excepting those which have been forfeited for non-payment of rent. Rents which may be received upon such of these selections as may have been forfeited by operation of law, will be deemed to have been received conditionally, and without prejudice to the right of the Government to deal with the same according to the provisions contained in the Act in that behalf."

The schedule contained the name of the appellant (who was then the assignee of the lease), the allotment No. 196, and the amount due was described as "third year's rent, £40."

Similar notices were published in the Gazette on the 18th of November, 1870, and the 31st of October, 1871.

After the rent for the whole term of eight years had been fully paid, and before the term of the lease had expired, and without an offer to refund any part of the money, this ejectment was commenced.

The writ bears date the 16th of September, 1871, and alleges the title of the Crown to have accrued on the 3rd of May, 1869, treating the lessee and his transferees as trespassers from that date.

Upon the trial of the action, in which the above facts were admitted or proved, the judge directed the verdict to be entered for the Crown; one question only, which will be hereafter adverted to, having been left to the jury. The principal points were reserved for the consideration of the court, which, by the judgment under appeal, sustained the verdict. . . .

If then the Crown could treat the lease as voidable, the further question to be considered is, Has it elected so to treat it and waived the forfeiture?

On this part of the case their Lordships have felt no difficulty. The evidence of waiver seems to them to be clear and overwhelming. Not only was the rent for three successive years accepted in advance, but in 1873 the whole of the remaining rent accruing under the lease was paid up in full. And these rents were received by the officers of the Government, as appears by the evidence before set out, not only with full knowledge of the breach of the condition, but in consequence of the decision of the ministers of the Crown in the colony, come to after mature deliberation, that the Government of the colony wanted the money, and could not afford to insist upon the forfeiture.

It was sought to obviate the effect of these receipts by referring to the passage contained in the "notification of rents due," set out above. This notification appeared in the Gazette in three successive years, the last year being as far as appears 1871. After that year the publication was apparently abandoned. It is therefore very doubtful whether this notification can in any way affect the acceptance in the year 1873 of all the rent then remaining due.

But, supposing this notice is to be regarded as pointing to all future rents, their Lordships think it would not prevent the acceptance of these rents from operating as a waiver. The notification itself describes the payments as "rent," and their Lordships have no difficulty, upon the evidence before adverted to, in coming to the conclusion of fact, that the money was not only paid, but received as "rent."

A question of this kind received great consideration in the House of Lords in *Croft* v. *Lumley*, 6 H. L. C. 672. In that case the facts were much more favorable to the contention that there was no waiver than in the present. The tenant tendered and paid the rent due on the lease after the landlord had declared that he would not receive it as rent under an existing lease, but merely as compensation for the occupation of the land. The opinion of all the judges, except Mr. Justice Crompton, was that the receipt of the money under these circumstances operated as a waiver. In the present case the rent, as already stated, was received as rent, with, at most, a protest that it was received conditionally, and without prejudice to the right to deal with the land as forfeited. Lord Wensleydale, who was disposed to agree with Mr. Justice Crompton in his conclusion of fact in the particular case, appeared to have no doubt that when money is in fact received as rent, the waiver is complete. A very learned judge, Mr. Justice Williams,

gave his opinion in the following terms: "It was established as early as *Pennant's Case*, 3 Rep. 64 a, that if a lessor, after notice of a forfeiture of the lease, accepts rent which accrues after, this is an act which amounts to an affirmance of the lease and a dispensation of the forfeiture. In the present case the facts, I think, amount to this: that the lessor accepted the rent, but accompanied the receipt with a protest that he did not accept it as rent, and did not intend to waive any forfeiture. But I am of opinion the protest was altogether inoperative, as he had no right at all to take the money unless he took it as rent; he cannot, I think, be allowed to say that he wrongfully took it on some other account, and if he took it as rent, the legal consequences of such an act must follow, however much he may repudiate them."

Without finding it necessary to invoke this opinion to its full extent in the present case, it is enough for their Lordships to say that where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture, cannot countervail the fact of such receipt.

The finding of the jury that there was no waiver appears from the notes of the learned judge who tried the cause to have been founded on his direction, "that the intention of the party receiving the rent, and not of the party paying it, must be looked at in considering the question of waiver, and that unless the jury were of opinion that the rents were received after the 23d of May, 1869, unconditionally and unreservedly, they should find no waiver." In their Lordships' view of the law which has just been stated, this direction is erroneous. They do not, however, deem it necessary to send down the case for a new trial, because the question of waiver really depends on undisputed facts, from which the proper legal inference to be drawn is, in their opinion, clear. Even if the evidence of the receipt of the money as rent had been less convincing than they have found it to be, they would have hesitated to come to the conclusion that the ministers of the Crown took this money wrongfully, and without any color of right, as they would have done if it had not been accepted as rent.

Upon a review of the whole case, therefore, they are of opinion that the verdict ought to be entered for the defendant.

In the result, their Lordships will humbly advise her Majesty to reverse the judgment of the Supreme Court, discharging the rule *nisi* of the 11th of December, 1874, and, instead thereof, to direct that such rule be made absolute to set aside the verdict found for the plaintiff, and to enter the verdict for the defendant, with costs.

The defendant (appellant) will also have the costs of this appeal.

NOTE. — On relief in equity against forfeiture for breach of conditions, see 2 Lead. Cas. in Eq. (6th ed.) 1245 *et seqq.*

CHAPTER II.

REVERSIONS AND REMAINDERS.

Co. Lit. 22 b. If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void, and he hath the reversion in him, for the ancestor during his life beareth in his body (in judgment of law) all his heirs, and therefore it is truly said, that *hæres est pars antecessoris.* And this appeareth in a common case, that if land be given to a man and his heirs, all his heirs are so totally in him, as he may give the lands to whom he will.

So it is if a man be seised of lands in fee, and by indenture make a lease for life, the remainder to the heirs male of his own body, this is a void remainder; for the donor cannot make his own right heir a purchaser of an estate tail without departing of the whole fee simple out of him: as if a man make a feoffment in fee to the use of himself for life, and then to the use of the heirs male of his body, this is a good estate tail executed in himself, and the limitation is good by way of use, because it is raised out of the state of the feoffees, which the feoffor departed with, and that is apparent, for a limitation of use to himself had without question been good.

BUCKLER *v.* HARDY.

Queen's Bench. 1597.

[*Reported Cro. El.* 585.]

Ejectione firmæ. Upon a special verdict the case was, Andrew Buckler being tenant for life, the remainder to Christopher Buckler in tail, remainder to the right heirs of the said Andrew, lets the land to J. S. for four years, and afterwards granted the reversion to one Row, *habendum* from Midsummer next for the life of the said Andrew Buckler. After Midsummer, J. S. the lessee attorned to Row, and after that granted all his term unto him. Row entered, and granted the land to Hardy the defendant, to have and to hold to him for his life: but no livery was made. Hardy entered; and after the four years expired Hardy continued his possession. Andrew Buckler levied a fine to him *sur conusance de droit come ceo &c.* Christopher Buckler the tenant in tail enters for a forfeiture, and lets it to the plaintiff for years, upon whom the defendant re-entered. *Et si, &c.* — The first question was, When this reversion was granted by Andrew Buckler

to Row, *habendum* after Midsummer, and the attornment to that grant is after Midsummer, whether it be a good or void grant? — And all the JUSTICES agreed, that the grant was void, being limited to begin at a day to come; for if it should be good, the lessor should have a particular estate reserved in himself in the mean time, which cannot be. So if the attornment had been made thereto presently, yet it had been clearly ill. And although the attornment was not till after Midsummer, yet it cannot help the grant, which was void at the beginning; for *quod ab initio non valet, in tractu temporis convalescere non potest:* as if a man makes a lease for years, and before the lessee's entry he grants the reversion, and afterwards the lessee enters and attorns, yet it is void; because he had not at that time a reversion to grant. So in *Trevillian's Case*, one devised his land before the Statute of Wills, and afterwards the Statute was made, and the devisor died, yet this will is void: but if a man grants a reversion, *habendum* after the death of the tenant for life, it is good: for it is but a limitation when he shall have the possession: but, if it were *habendum* after the death of a stranger, it should be otherwise. — POPHAM said, it had been ruled, where a feoffment was made *habendum* after Michaelmas, and the attorney made livery after Michaelmas, yet it was void.

Secondly, admitting the reversion passed not to Row, when he afterwards purchased the term, and granted the land to Hardy for his life (no livery being made), Whether the land passed by that grant? — And GAWDY, FENNER, and POPHAM, held, that the term passed; for 10 Eliz. Dyer, 277, is, where a termor for years devised the land to one for his life, that the term passed. So here. But POPHAM said, if there had been in the deed a letter of attorney to make livery, then peradventure it would have been otherwise; for thereby the purpose of the grantor had appeared to pass a freehold, and not the term only: but here is no more than the grant of his term during his life.

Thirdly, admitting he had the term or not by this grant, Whether, after the term expired, he continuing the possession shall be said to be tenant at sufferance? and if he hath not the term, Whether by his entry he be a disseisor? And then when Andrew Buckler levied a fine unto him *sur conusance de droit come ceo*, &c., it is a forfeiture every way; for the conusor and the conusee are both estopped to say, that he had not any estate before the fine, by the gift of the conusor. Wherefore it is a manifest forfeiture; and so the entry of Charles Buckler, tenant in tail, is congeable. Wherefore it was adjudged for the plaintiff. See s. c. in the Common Pleas, Cro. El. 450. 2 Co. 55. Moor. 423.

ARCHER'S CASE.

QUEEN'S BENCH. 1597.

[*Reported* 1 *Co.* 66 *b.*]

BETWEEN Baldwin and Smith, in the Common Pleas, which began Trin. 39 Eliz. rot. 1676, in a replevin, upon a special verdict, the case was such: Francis Archer was seised of land in fee, and held it in socage, and by his will in writing devised the land to Robert Archer the father, for his life, and afterwards to the next heir male of Robert, and to the heirs male of the body of such next heir male; Robert had issue John, Francis died, Robert enfeoffed Kent with warranty upon whom John entered, and Kent re-entered, and afterwards Robert died, &c. At first, it was agreed by ANDERSON, WALMSLEY *et totam cur'*, that Robert had but an estate for life, because Robert had an express estate for life devised to him, and the remainder is limited to the next heir male of Robert in the singular number; and the right heir male of Robert cannot enter for the forfeiture in the life of Robert, for he cannot be heir as long as Robert lives. Secondly, that the remainder to the right heir male of Robert is good, although he cannot have a right heir during his life; but it is sufficient that the remainder vests *eo instanti* that the particular estate determines. And so it is agreed in 7 Hen. 4, 6 b, and *Cranmer's Case*, 14 Eliz. Dyer 309 a. Thirdly (which was the principal point of the case), it was agreed *per totam cur'*, that by the feoffment of the tenant for life, the remainder was destroyed; for every contingent remainder ought to vest, either during the particular estate, or at least *eo instanti* that it determines: for if the particular estate be ended, or determined in fact, or in law, before the contingency falls, the remainder is void. And in this case, inasmuch as by the feoffment of Robert, his estate for life was determined by a condition in law annexed to it, and cannot be revived afterwards by any possibility; for this reason the contingent remainder is destroyed, against the opinion of Gascoigne in 7 Hen. 4, 23 b. But if the tenant for life had been disseised, and died, yet the remainder is good, for there the particular estate doth remain in right, and might have been revested, as it is said in 32 Hen. 6. But it is otherwise in the case at the bar, for by his feoffment no right of the particular estate doth remain. And it was said it was so agreed by Popham, Chief Justice, and divers justices in the argument of the case between *Dillon and Freine*, and denied by none. See 11 R. 2, tit. Detinue, 46. And note the judgment of the book, and the reason thereof, which case there adjudged is a stronger case than the case at the bar. But note, reader, that after the feoffment, the estate for life to some purpose had continuance; for all leases, charges, &c., made by the tenant for life shall stand during his life, but the estate is supposed to continue as to those only who claim by

the tenant for life before the forfeiture; but as to all others who do not claim by the tenant for life himself, the particular estate is determined: and by the better opinion, the warranty shall bind the remainder, although the warranty was created before the remainder attached or vested, and although the remainder was in the consideration of the law, and he who shall be bound by it, never could have avoided it by entry, or otherwise; yet forasmuch as the remainder did commence, and had its being by force of the devise, which was before the warranty; for this reason it shall bind the remainder; but the same was not unanimously agreed: and as the feoffment of the tenant for life shall destroy the remainder, which was in consideration of law, so, *et a fortiori*, the warranty of his ancestor (by whom he is intended to be advanced) shall bind him. And in many cases one shall be bound, and barred of his right by a warranty, who could never have defeated it by any means, as in 44 Edw. 3, 30, and 44 Ass. p. 35. Lessee for life is disseised, to whom a collateral ancestor of the lessor releaseth, and dieth, he shall be barred. *Vide* 3 Hen. 7, 9 a, and 33 Hen. 8, Br. Guarantee, 84, a feme covert, who cannot enter nor avoid the warranty, shall be barred. So if tenant for life, the remainder to the right heirs of J. S., had been disseised, and the disseisor had levied a fine at the common law, the right heir of J. S. shall be bound, and yet he could not enter nor make claim. But the point adjudged was, that by the feoffment of the tenant for life, the remainder was destroyed.[1]

WEBB *v.* HEARING.

King's Bench. 1617.

[*Reported Cro. Jac.* 415.]

Ejectment for a messuage in London. Upon a special verdict the case was, that William Say was seised in fee of this messuage holden in socage, having Margaret his wife, Francis his son, and three daughters, Agnes, Alice, and Elizabeth, and deviseth the said messuage in this manner: "I bequeath to Francis my son my houses in London, after the death of my wife; and if my three daughters, or either of them, do overlive their mother, and Francis their brother and his heirs, then they to enjoy the same houses for term of their lives; and the same houses then I give to my sister's sons, Roger Wittenbury and John Wittenbury, and they to pay yearly to the Bachelors' Company of Merchant Taylors £6 10*s*. And if they or their successors deny the payment of the said sum, then it shall be lawful to the wardens of the said company to enter and discharge them forever." It was found, that the devisor died; the son and two of the sisters died without issue; the wife Margaret survived them, entered, and died; Elizabeth, the third sister,

[1] See *Purefoy* v. *Rogers*, 2 Saund. 380 (1669).

survived, entered, and died, having issue the defendant; John Wittenbury died; Roger entered, and died; Henry Pierson the lessor, his cousin and heir, entered, and made that lease; the defendant, as cousin and heir of Francis the son, ousts him, &c.

The principal question was, Whether Francis the son had a fee or a fee-tail by this will, in regard the limitation is, "If his sisters survive him and his heirs"?

The Court resolved, he had but a fee-tail; for "heirs," in this place, is intended "heirs of his body;" for the limitation being to his sisters, it is necessarily to be intended, that it was if he should die without issue of his body; for they are his heirs collateral. And therefore there is a difference where a devise is to one and his heirs, and if he die without heirs, that it shall remain, it is void, as 19 Hen. 8, pl. 9; yet when a devise is to one and his heirs, and if he die without heir, it shall be to his next brother, there is an apparent intention what heirs he intended; and the intention being collected by the will, the law shall adjudge accordingly. *Vide* 18 Eliz.; Dyer, 333, *Chapman's Case;* 6 Co. 16, *Wild's Case.*

The second point, whether John Wittenbury and Roger Wittenbury had a fee by this devise? And it was resolved they had; because they had paid a consideration for it, viz., an annual sum; and the words, "if they or their *successors* deny the payment," show the intent, that it should go to their heirs. *Vide* 4 Edw. 6, "Estate," Br. 78; 6 Co. 16.

A third point, the estate being limited, "And if my three daughters or either of them, do overlive their mother and brother and his heirs, then they to have it, and after them John Wittenbury and Roger Wittenbury, &c." Whether this be a contingent estate, and if so, whether it were performed, two of the daughters dying in the lifetime of their brother? And it was resolved that this was no limitation contingent, but shows when it shall commence, which is well enough performed: wherefore it was adjudged for the plaintiff. — I was of counsel with the plaintiff.

NAPPER *v.* SANDERS.

Common Pleas. 1632.

[*Reported Hutt.* 118.]

In an *ejectione firmæ* brought by Robert Napper against Henry Sanders, upon a lease by deed indented, made by John Napper and Elizabeth his wife, and Francis Sanders, upon Not guilty pleaded, the jury gave a special verdict, whereupon the case was such.

Margaret Sanders seised in fee, makes a feoffment to the use of herself for life, without impeachment of waste, and after to the use of the feoffees for eighty years, if one Nicholas Sanders and Elizabeth his

wife should live so long, and if the said Elizabeth survive Nicholas her husband, then to the use of the said Elizabeth for life, without impeachment of waste, and after the decease of the said Elizabeth, to the use of Posthumus Sanders, son of the said Nicholas and Elizabeth in tail: and for default of such issue, to the use of Elizabeth, wife of the said John Napper, and Dorothy Sanders, and the said Francis Sanders one of the lessors, and to the heirs of their bodies, remainder to the right heirs of Margaret the feoffor: and there was a clause in the said indenture, that the intent of the estate for years to the feoffees was, that the said Elizabeth Sanders might have the profits, and not Nicholas her husband, who was a prodigal. Margaret Sanders dies, and Dorothy dies without issue, the feoffees enter, Elizabeth Sanders dies, Nicholas is yet alive, and Posthumus dies without issue. John Napper and his wife, and the said Francis entered and were possessed, until the defendant as son and heir of the said Margaret, entered and ousted them. *Et si super totam materiam*, &c.

And the sole question was, whether the remainder in tail to Posthumus, and the remainder in tail to Elizabeth and Francis, were contingent or executed; and it was resolved by all the COURT, that the remainders were not contingent in the estate for life which was to come to Elizabeth Sanders, the wife of the said Nicholas, but were vested presently. And it was agreed, that the estate for life, if she survive her husband, was contingent: and when that had happened, being by way of limitation of an use, it shall be interposed when the contingent happen, as in *Chudley's Case*, Coke, lib. 1, fol. 133, a feoffment to the use of the feoffor for life, and after his death to his first son which shall be afterwards born, for his life, and so to divers: and afterwards to the use of I. D. in tail: it is resolved that all the uses limited to persons not *in esse* are contingent, but the uses to persons *in esse* vest presently, and yet these contingent uses when they happen vest by interposition, if the first estate for life which ought to support them be not disturbed. And in this case it was a good estate for life in Margaret: and then gives the remane in the feoffees for eighty years, if Nicholas and Elizabeth Sanders so long should live, and if Elizabeth survive Nicholas, then to Elizabeth for her life, and after her decease to Posthumus in tail, and after his decease to the said three daughters in tail, so that there the estate for years determines upon the death of Elizabeth, and so also the estate for life to Elizabeth, which was contingent, determines by her death.

And the *Lord Darbies Case*, a feoffment to the use of Edward, late Earl of Derby in tail, and then to the use of the two feoffees for eighty years, if Henry late Earl of Derby should so long live, and after his decease to Ferdinand, and to the heirs males of his body, and for default of such issue, to the use of William now Earl of Derby. And it was adjudged that the remainders vest presently: and this possibility that Henry might have overlived the eighty years, will not make the remainders contingent. And in a suit which was at Lancaster between

Farrington and another, upon a special verdict there found about 8 Jac. and many times argued at Serjeants' Inn, it was afterwards adjudged a good remainder and not contingent; and the same case in this court upon a *scire facias* for to have execution of certain land, for debt recovered against the Earl of Derby, which land was entailed by the same conveyance, &c., brought against the Earl of Bridgwater and his wife, one of the co-heirs of Ferdinand, Earl of Derby, was adjudged in this court, *vide Boraston's Case*, Coke, lib. 3, fol. 20, 14 Eliz. Dyer, 314; *Lovies Case*, Coke, lib. 10, 27 H. 8, 24; 38 E. 3, 26; 5 E. 3, 27; 30 E. 3. *Collthurst and Bemchin's Case* was urged, that the remainder limited to B. for life, and after that C. hath married Ja. S. then to the use of C. in fee, this is contingent, and is collateral; and this case is not like to that.

And after argument at bar, this term (it being argued before that the Lord Richardson was there, who was of the same opinion) we all concurred, and judgment was entered for the plaintiff.[1]

PLUNKET *v.* HOLMES.

King's Bench. 1661.

[*Reported* 1 *Lev.* 11.]

In ejectment, Not guilty was pleaded and a special verdict found on which the case was, a man seised in fee, devised the land to his eldest son Thomas for life, and if he dies without issue living at the time of his death, to Leonard, another son, and his heirs; but if Thomas had issue living at his death, that then the fee should remain to the right heirs of Thomas forever: Thomas enters after the devisor's death, and suffers a common recovery (under which the defendant claims) and dies without issue; whereupon Leonard enters and makes the lease to the plaintiff. This case was argued twice in this and the following term, by *Scroggs* and *Alleyn* for the plaintiff, and *Jones* and *Finch*, the King's Solicitor, for the defendant, and two questions were made. 1. If Thomas had by the will only an estate for life by the devise, with a contingent remainder to Leonard, or whether the fee was vested in Thomas, with an executory devise to Leonard. 2. If it be an executory devise to Leonard, if the common recovery has barred it. And for the plaintiff it was argued, that Thomas had a fee, for though only an estate for life be devised to him, yet by descent of the reversion the whole fee was in him, which merged his estate for life, and this is executed in him; and then the estate to Leonard cannot be any other than an executory devise, for when the whole fee is given or vested in one person, with a limitation of a fee to another upon a contingency, this cannot be a remainder, for one fee

[1] See 1 Leake, Land Law, 327, 328.

cannot remain upon another, but of necessity must take effect as an executory devise: but when only part of the estate is disposed, as for life or in tail, and the residue given to another on a contingency; as to the right heirs of J. S. who is in life, or to such a person as shall be living in the house at such a time, this is a contingent remainder. But here the whole estate is in Thomas, either by the devise or by descent, and then the devise to Leonard must of necessity be an executory devise which, being to happen within the compass of a life, has been allowed; as in *Pell and Brown's Case*, 2 Cro. &c. And as to the second question they also relied on *Pell and Brown's Case*, where it is adjudged, that a recovery shall not bar in such case. But on the other side it was argued, and so resolved by the whole court in Michaelmas Term, 13 Car. 2, that Thomas took but an estate for life by the will, and the remainder to his heirs not executed; and though he be the heir to whom the reversion descends, that shall not drown the estate for life contrary to the express devise and intent of the will, but shall leave an opening as they termed it, for the interposing of the remainders when they shall happen to interpose between the estate for life and the fee; and they compared it to *Archer's Case*, 1 Co., where though Robert the devisee for life was heir, yet the remainder to his next heir male was contingent, and so not an estate for life merged by the descent of the reversion: and so the estate of Thomas here being only for life, by this devise the remainder to Leonard was a contingent remainder, and barred by the recovery; and then the second point will not come in question, whether an executory devise shall be barred by a common recovery. But on the first point they all gave judgment for the defendant.[1]

LUXFORD *v.* CHEEKE.

COMMON PLEAS. 1683.

[*Reported* 3 *Lev.* 125.]

EJECTMENT upon the demise of Benjamin Cutter and Mary his wife; and upon Not guilty it was found by special verdict, that John Church was seised in fee, and by his wife Isabel had issue four sons: Humphry the first, Robert the second, Anthony the third, John the fourth; and by his will the 6th of March, 1583, devised all to his wife for her life, *if she do not marry, but if she do marry, that Humphry presently after her decease enter, have, hold, and enjoy all the land to him and the heirs males of his body: remainder to Robert, and the heirs males of his body; the remainder to Anthony, and the heirs males of his body; remainder to John, and the heirs males of his body; with*

[1] See *Doe* d. *Planner* v. *Scudamore*, 2 B. & P. 289 (1800). "It is a settled rule of law that where the court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise." Id. 298.

divers remainders over: that Isabel the wife did not marry; and they derive title from Humphry to his grandson, and from him to the wife (the lessor) *filiam unicam suam;* and that the title of the defendant was as heir male of the body of Robert the second son. And after argument it was resolved, that the verdict is imperfect as to the plaintiff, for the grandson of Humphry, though he hath no other daughter, may nevertheless have a son, according to *Gymlett and Sand's Case*, Cro. Cha. 391. Whereupon by consent the verdict was mended, and made *filiam unicam et hæredem suam.* And then the question was, whether any estate tail be created by this will. For Isabel the wife never married, and if no entail was created, then the *feme-lessor* hath a good title as heir general. But upon argument the court resolved, that the land was entailed by this will: for by the whole scope of the will it appears plainly, the devisor intended an entail with several remainders over; and rather than this intent shall be defeated, the words shall be read and taken thus: *scil. if she marry, Humphry to enter presently; if she do not marry, then Humphry shall have, hold, and enjoy them to him and the heirs males of his body, with remainder over.* Whereupon judgment was given for the defendant.

EDWARDS *v.* HAMMOND.

COMMON PLEAS. 1683.

[*Reported* 3 *Lev.* 132.]

EJECTMENT upon Not guilty, and special verdict, the case was: A copyholder of land, borough English, surrendered to the use of himself for life, and *after to the use of his eldest son and his heirs, if he live to the age of* 21 *years; provided, and upon condition, that if he die before* 21, *that then it shall remain to the surrenderer and his heirs.* The surrenderer died, the youngest son entered; and the eldest son being 17 brought an *ejectment;* and the sole question was, whether the devise to the eldest son be upon condition *precedent*, or if the condition be *subsequent; scil.* that the estate in fee shall vest immediately upon the death of the father, to be divested if he die before 21. For the defendant it was argued, that the condition was *precedent*, and that the estate should descend to the youngest son in the mean time, or at least shall be in contingency and in *abeyance* till the first son shall attain to one and twenty; and so the eldest son has no title now, being no more than 17. On the other side it was argued, and so agreed by the COURT, that though by the first words this may seem to be a condition *precedent*, yet, taking all the words together, this was not a condition *precedent*, but a present devise to the eldest son, subject to and defeasible by this condition subsequent, *scil.* his not attaining the age of 21; and they resembled this to the case of *Spring and Cæsar*, reported by Jones, J., and abridged by Roll. 1, Abr. 415, *nu.* 12. A fine to the use of B. and his

heirs if C. pays him not 20*s.* upon Septemb. 10, and if C. does pay, to the use of B. for life, remainder to C. and his heirs, where the word *si* does not create a condition precedent, but the estate in fee vests presently in C. to be divested by payment afterwards; so here. Accordingly this case was adjudged in Mich. Term next following.[1]

REEVE *v.* LONG.

KING'S BENCH AND HOUSE OF LORDS. 1694.

[*Reported* 3 *Lev.* 408.]

ERROR of a judgment in ejectment in C. B. affirmed in B. R. where on a special verdict in ejectment the case was this. John Long being seised in fee devised the lands in question to Henry Long, the eldest son of his brother Richard, for life; the remainder to his first son in tail, remainder to all his other sons in the same manner, remainder to Richard the lessor of the plaintiff for life, remainder to his first and all his other sons in tail; with divers remainders over, and dies. Henry enters and was seised, but before he has any son born dies, leaving his wife great with child. Richard the lessor enters as in his remainder; and six months after the defendant, son of Henry, is born, and his guardian enters for him upon the lessor, who thereupon brings ejectment, and the cause being tried before *Turton*, Baron of the Exchequer, this whole matter was found specially; and upon argument in C. B. judgment was by the whole court given for the plaintiff for two causes: 1. For that this being a contingent remainder to the first son of Henry, and he not being born at the time the particular estate determined, it became void. 2. The next in remainder being the lessor, and he having entered before the birth of the first son of Henry, he was in by purchase, and shall not be evicted by an heir born afterwards, 5 E. 4, 6; 9 H. 7, 5, &c., whereupon the defendant brought error in B. R., where the judgment was affirmed by the whole court; whereupon he brings error in Parliament where the judgment was reversed by almost all the Lords in Parliament, because it being a will they construed it according to the intent and equity and meaning of the parties, which they said could never be to disinherit the heir of the name and family of the devisor, nor would they do it on such a nicety. But all the judges were much dissatisfied with this judgment of the Lords, nor did they change their opinions thereupon, but very much blamed Baron Turton for permitting it to be found specially where the law was so clear and certain.

Levinz for the plaintiff in the ejectment.[2]

[1] Followed in the case of freehold land in *Bromfield* v. *Crowder*, 1 B. & P. N. R. 313 (1805). Cf. *Boraston's Case*, 3 Co. 19 a (1587); and see Hawkins, Wills, 237–242.

[2] 10 & 11 WM. III. *c.* 16 (1699). — *An Act to enable posthumous children to take estates as if born in their father's lifetime.* Whereas it often happens, that by marriage and other settlements, estates are limited in remainder to the use of the sons and

LODDINGTON *v.* KIME.

King's Bench. 1697.

[*Reported* 1 *Salk.* 224.]

In replevin a special verdict was found, viz., That Sir Michael Armin being seised in fee, devised a rent-charge, and then devises the land to A. for life, "without impeachment of waste; and in case he have any issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B. and his heirs forever." A. entered and suffered a common recovery, and died without issue.

1st question was, Whether A. was tenant in tail by this devise? Powell held the express estate for life not destroyed by the implication that arose on the latter words following, so that A. was only tenant for

daughters, the issue of such marriage, with remainders over, without limiting an estate to trustees to preserve the contingent remainders limited to such sons and daughters, by which means such sons and daughters, if they happen to be born after the decease of their father, are in danger to be defeated of their remainder by the next in remainder after them, and left unprovided for by such settlements, contrary to the intent of the parties that made those settlements: be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That where any estate already is or shall hereafter, by any marriage or other settlement, be limited in remainder to, or to the use of the first or other son or sons of the body of any person lawfully begotten, with any remainder or remainders over to, or to the use of any other person or persons, or in remainder to, or to the use of a daughter or daughters lawfully begotten, with any remainder or remainders, to any other person or persons, that any son or sons, or daughter or daughters of such person or persons lawfully begotten or to be begotten, that shall be born after the decease of his, her or their father, shall and may, by virtue of such settlement, take such estate so limited to the first and other sons, or to the daughter or daughters, in the same manner, as if born in the lifetime of his, her or their father, although there shall happen no estate to be limited to trustees, after the decease of the father, to preserve the contingent remainder to such afterborn son or sons, daughter or daughters, until he, she or they come *in esse*, or are born, to take the same; any law or usage to the contrary in any wise notwithstanding.

II. Provided also, That nothing in this Act shall extend or be construed to extend to divest any estate in remainder, that by virtue of any marriage or other settlement, is already come to the possession of any person or persons, or to whom any right is accrued, though not in actual possession, by reason or means of any afterborn son or sons, or daughter or daughters not happening to be born in the lifetime of his, her or their father."

"It is singular that this Statute does not expressly mention limitations or devises made by wills. There is a tradition that, as the case of *Reeve* v. *Long* arose upon a will, the Lords considered the law to be settled by their determination in that case; and were unwilling to make any express mention of limitations or devises made in wills, lest it should appear to call in question the authority or propriety of their determination." — *Butler's Note to Co. Lit.* 298 *a*.

"It seems indeed now settled that an infant *en ventre sa mere* shall be considered, generally speaking, as born for all purposes for his own benefit." — *Per* Buller, J., in *Doe* d. *Clarke* v. *Clarke*, 2 H. Bl. 399, 401 (1795). Cf. *Blasson* v. *Blasson*, 2 De G. J. & S. 665 (1864). See 4 Gray, Cases on Prop. 32–36.

life, and the rather, because these words, viz., *impeachment of waste,* and *for life,* must in that case be rejected, *quod* TREBY, C. J., *concessit.* 2dly. The COURT held, that issue was to be taken here as *nomen singulare,* because the inheritance was annexed and limited to the word *issue;* so that the inheritance was in the issue, and not in A. the father. 3dly. That this limitation to the issue was not an executory devise, being after a freehold, but a contingent remainder, so that a posthumous son could never take. 4thly. That the remainder limited to the issue of A. was a contingent remainder in fee, and that the remainder to B. was a fee also. But those fees are not like one fee mounted on another, nor contrary to one another, but two concurrent contingencies, of which either is to start according as it happens; so that these are remainders contemporary and not expectant one after another. 5thly. The Court held that the remainder in fee to B. was not vested, because the precedent limitation to the issue of A. was a contingent fee; and they took this difference, viz., Where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person *in esse,* vest; but no remainder limited after a limitation in fee, can be vested. 6thly. That the recovery suffered by A. had barred the estate limited to his issue, that being contingent, and likewise the remainder limited to B. and his heirs, because that was contingent, not vested, and now never could vest; and that A. had gained a tortious fee, which would be good against B. and his heirs, and likewise against all persons but the right heirs of the devisor.

Nota. In the report of this case in 3 Lev. 431, it is said, that the Court were agreed to give judgment for the avowant upon the point, that A. only took an estate for life, when POWELL, J., started the other point, whether the devise over to B. was only a contingent remainder, or an executory devise: Upon which it was afterwards twice argued; but that, before any judgment given, the parties agreed and divided the estate.[1]

SMITH *v.* PACKHURST.

HOUSE OF LORDS. 1742.

[*Reported* 3 *Atk.* 135.]

ON a writ of error in the House of Lords from the judgment in King's Bench the opinion of the judges as delivered by LORD CHIEF JUSTICE WILLES was as follows:—

[1] "Though both Levinz and Salkeld report that the parties agreed, and divided the estate, before any judgment was given, yet it appears from a MS. report of that case by Judge Blencowe (which report Serjeant Wilson has seen) that after a long consultation, judgment was given, that Evers Armin [A.] took an estate for life with a contingent remainder over, which was barred by the recovery suffered by Evers Armin." — *Doe d. Brown v. Holme,* 3 Wils. 237, 240 (1771). See also *Goodright* v. *Dunham,* Doug. 264 (1779).

In pursuance of your Lordships' order, I and my brethren have met to consider of the questions proposed, and are unanimous in our opinions; but as it is a point of great consequence and nicety, your Lordships will excuse me if I take some time in stating the case, and the reason of our opinion; which I shall do in as clear and intelligible a manner as I can. Mr. John Dormer in the year 1662, upon the marriage of his eldest son John Dormer, made a settlement of his estate with several limitations; and as the questions in the cause arose upon the words of the settlement which are agreed on both sides, I shall repeat them: "After limiting an estate to his son John Dormer and the heirs of his body, he limits his estate as follows; and in default of such issue, to the use and behoof of Robert Dormer, one of the brothers of the said John Dormer, for the term of 99 years, if he shall happen so long to live; and from and after the death of the said Robert Dormer, or other sooner determination of the estate limited to him for 99 years, to the use and behoof of T. S. and J. R. and their heirs during the life of the said Robert Dormer, upon trust to preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries and bring actions, as the case shall require; but to permit the said Robert Dormer and his assigns to receive the rents and profits of the said estate during the term of his life, and after the end or other sooner determination of the said term, to the use and behoof of the first and every other son of the said Robert Dormer in tail male, with remainder in the same words to Fleetwood, another brother of the said John Dormer, remainder to Peter another brother, and the last remainder to Eusebe, the father of the lessor of the plaintiff, for 99 years, if he so long live, remainder to the trustees in the like manner as in the limitation to Robert Dormer, and to the first and every other son of Eusebe Dormer in tail male." Robert Dormer had one son Fleetwood, and when he came of age Robert and his son Fleetwood levied a fine to make a tenant to the *præcipe*, and suffered a recovery, in which Fleetwood was vouched; the son died without issue, then Robert Dormer died, leaving no other son, but four daughters. Fleetwood and Peter are both dead without issue, and Eusebe being dead, his son, the lessor of the plaintiff, and the nearest surviving remainder-man, made his actual entry within five years, and being so seised demised to the plaintiff, &c.

The two questions proposed by your Lordships were first, whether the remainders limited to the first and every other son of Eusebe were good remainders in their first creation; and secondly, whether the fine and recovery suffered by Robert Dormer and his son barred these remainders.

Before I proceed to the questions, I shall lay down some general rules and maxims of the law, with respect to the construction of deeds; first, it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

Another maxim is, that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor. The words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible: these maxims, my Lords, are founded upon the greatest authority, Coke, Plowden, and Lord Chief Justice Hale, and the law commends the *astutia*, the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may show the ingenuity of counsel, but is very ill becoming a judge.

Having laid down these maxims, I shall proceed: in this case the intention of the party cannot be doubted; the grantor manifestly intended to continue the estate in his name and blood as far as he could by the rules of law. The law will not admit a perpetuity, but the intention of the party so far as is consistent with the rules of law ought to be observed.

In this case it was said that the intention of the party by appointing trustees to preserve the contingent remainders, was only to preserve the estate till there were issue of Robert Dormer, and that they were not meant to preserve the distant remainders; but if this had been the case how came Robert Dormer not to be made tenant for life, for even though he had been tenant for life, the trustees could have preserved the remainders till his son came of age; but the plain intent of making him tenant for 99 years only, was to prevent him and his son from barring the estates in remainder without the joining of the trustees, the effect of which is, that it could not be barred without the consent of the trustees during the life of Robert Dormer, which is going as far as the law will permit.

The objections to the limitations to the first and other sons of Eusebe, &c., were these: first, that the commencement of the estate to the trustees and to the first son was at the same time, and consequently the latter limitation was void. Secondly, that the limitations were inconsistent, and therefore void; and thirdly, that where there is an estate limited upon two disjunctives, which cannot stand together (because if one happens, the other cannot) that in such case it shall take effect upon neither, but the settlement shall rather be construed to be void.

As to the first, we are clearly of opinion, that the limitation of the estate to the trustees and to the first son, &c., commenced at different times; in support of the first objection it was said that an estate limited during the life of another to commence at his death, is void; this is certain, but when the deed goes on and says, or other sooner determination of the term for years, this manifestly fixes a commencement of the estate to the trustees, at the determination of the term,

which might happen not only by effluxion of time, but may take effect by surrender, or forfeiture, several ways, in the life-time of Robert Dormer or Eusebe: and we are of opinion, that the estate of the trustees might so commence; but the estate to the first son, &c., could not commence till the death of their respective fathers.

It is said by my Lord Coke, that the word term, though it is more properly applied to a term for years, yet may mean an estate for life, and it is plainly in this deed used in that sense: the trustees are to permit Robert Dormer, &c., to receive the profits during the term of his life; and the estate to the children is not to commence till the end, or other sooner determination of the said term, which, by referring the relative to the last antecedent, must mean the term of his life; as to the words *sooner determination*, inserted after the estate for life, these are insensible, and may be rejected; they were probably thrown in *currente calamo*, or by following a precedent, and if the precedent was before the Reformation, when there was a civil death, as well as a natural, by entering into religion, it might then have a meaning.

As to the second point, since we are of opinion that there was a different commencement of the estates limited to the trustees, and the issue in tail, there is no inconsistency.

As to the third, it is highly absurd, and against reason, and I think against law too: but in support of this, the case of *Camberford and Birch*, 2 Lev. 157, was cited by the defendant's counsel; there the settlement was with a proviso, that in case none of the brothers or sisters of A. or any of the children be living, then immediately, or after a term of 21 years ended, to the use of B., C., and D. his brothers, successively in tail male, remainder to the plaintiff: A. died without issue, B. and C. died without issue male, but B. had issue a daughter; and A. himself had sisters living; this the court held to be one sentence, and a condition precedent; that none of the brothers or sisters of A. or any of their children be then living, and which, as it had not happened, all the remainders were void, and judgment for the defendants; and it was not at all determined on the necessity there was, that the remainders should take effect on both disjunctives; but that case does not come up to the present, for it was never intended that the remainder should vest on the death of Robert Dormer, but as appears by the express words on a determination of the estate *for* 99 *years* before his death, and such a construction as the defendant's counsel contended for, would destroy not only the remainder to Eusebe, but every one of the remainders limited by the deed, except the remainder to John Dormer and his heirs; and the words of a deed must be extremely strong, which would induce us to construe all the limitations in the deed to be void: we therefore are of opinion, that the limitations to the first and every other son of Eusebe, were good remainders.

As to the second principal question, Whether the limitations to the first and other sons of Eusebe, were well barred by the fine and recovery, without the joining of the trustees? It was insisted upon, to

show they were barred. first, that no estate at all vested in the trustees: secondly, if any estate vested, it was a contingent estate, or a right of entry only; and, thirdly, that whatever estate it was, it was effectually barred by the fine and recovery.

As to the first, we are of opinion, that an estate commenced in the trustees immediately after the determination of the term for years, by effluxion of time, forfeiture, or otherwise.

As to the second, whether the estate to the trustees was a vested or contingent estate, appeared to us the great difficulty in the case; the doctrine of contingent remainders is very nice and intricate, and if we were to cite all the cases in the books, I fear we should rather puzzle than explain the difficulty: the definition of a contingent remainder, laid down by the counsel for the plaintiff, that a remainder was contingent when it was uncertain whether it would take effect or not, is, by no means, the legal notion of a contingent remainder; it is not the uncertainty of taking effect in possession that makes it contingent; if an estate is limited to A. for life, remainder to B. and the heirs of his body, every one will allow that this is a vested remainder; and yet, it must be allowed, that it is uncertain, whether B. may not die without heirs of his body before the death of A. and consequently the remainder may never take effect in possession.

We have considered this point a good deal, and are of opinion, that all contingent remainders may be reduced to these two heads: first, where a remainder is limited to a person not in being, and who may possibly never exist; and secondly, where a remainder depends upon a contingency collateral to the continuance of the particular estate. I will give an instance of each. If an estate is limited to A. for life, the remainder to his first son before he has any child; this is a contingent remainder of the first kind, for it is uncertain whether he will have any son. If an estate is limited to A. for life, and after the death of J. S to B. in fee, or after J. S. shall come from Rome; this is a contingent remainder of the second kind; for it is uncertain what time J. S. shall die, or shall come from Rome: for as the law, for many good reasons, will not permit the freehold to be in abeyance, it expects the contingent remainder to take place when the particular estate determines, and it cannot immediately vest in those cases, when it is uncertain whether the contingency will happen.

The present case comes under neither of these heads. the trustees are in being, and capable of taking: the estate does not depend upon any contingency collateral to the continuance of the particular estate; we, therefore, are of opinion, that, subject to the term of 99 years, a good estate of freehold vested in the trustees during the life of Robert Dormer. I will put one case: supposing a person grants an estate to A. for 99 years, if A. should so long live, and after the death of A. to another; supposing A. should outlive the term, or commit a forfeiture, is not the freehold vested in the grantor during the life of A., and has not he a power to enter, and if he has an estate in this case, may he not

grant it away upon the same terms, and would not his grantee have the same estate? But consider what would be the consequence, if the trustees do not take but upon a contingency, their heirs cannot take; and if the trustees die before the contingency happen, the limitation to their heirs fails; and if the estate limited here to the trustees is contingent, so are the limitations to trustees in all settlements, and consequently all the settlements for these 200 years, ever since the Statute of Uses, may be questioned. But can we conceive, my Lords, that every one has been mistaken for these 200 years, and that this new light is just now arisen to us? Surely it is a much less evil to make a construction, even contrary to the common rules of law (though I think this is not so), than to overthrow, I may say 100,000 settlements; for it is a maxim in law, as well as reason, *communis error facit jus*.

As to the right of entry, I should scarce have thought it deserved an answer, but that some weight has been laid upon it; we are of opinion, that a right of entry always supposes an estate; for what is a right of entry, without a right to hold and receive the profits? Therefore, I have always thought, that if an estate is granted to a man reserving rent, and in default of payment, a right of entry was granted to a stranger, it was void: a case was cited to endeavor to show, that a right of entry might subsist without an estate; but I am inclined to think some material circumstances in that case are omitted, and are agreed in our judgment, that the law is otherwise; and for these reasons are of opinion, that not a mere right of entry, nor a contingent estate, but an estate of freehold, was vested in the trustees during the life of Robert Dormer.

The last point to be considered, is, What will be the effect of the fine and recovery?

As to the fine, it hath been insisted, that it is a feoffment upon record, and that a fine even by tenant for years is not void; as to this fine, it must be considered either as a fine of lessee for years, or as a fine of a reversioner in tail; fines of lessee for years, I confess, are not absolutely void, but operate by way of estoppel, and therefore bar the parties claiming under them; a reversioner may levy a fine, for this reason, and it bars the issue in tail, but it can never be conceived that the fine of a reversioner can get the freehold; let us therefore consider it as the fine of a lessee for years. It has been said, that lessee for years, in this case, might have barred all remainders by a feoffment; that a fine *sur done grant* and render supposes a gift, which means a feoffment, and therefore is equivalent to a feoffment: I am of opinion that even a feoffment would not have been a bar unless the trustees had been asleep, for they might have immediately entered, and possessed the estate; if they had lain by till the recovery had been perfected, that might have been a bar, but that is not to be supposed. It has been said, that a fine supposes a feoffment; but the word *done*, though it sometimes signifies a feoffment, has many other significa-

tions; it may signify grants of incorporeal inheritances, which will not pass by feoffment, and therefore does not necessarily suppose a feoffment: a feoffment differs very materially from a fine, for in notoriety of fact, the feoffment is supposed to be made openly upon the land, and the feoffee is immediately put into the possession, but a fine has nothing public except the proclamations; and therefore by the Act of Parliament of 4 Hen. 7, non-claim runs only from the proclamations; whereas, if a fine supposes a feoffment, it will have its effect from the time of acknowledging, which is a private transaction. A feoffment can only lie of land, a fine may be of tithes, and other incorporeal inheritances.

Great weight has been laid upon Lord Coke's authority, who says a fine is a feoffment upon record. He was certainly a great man, which has made some people think everything he says is right, though he has his mistakes. But, in answer to it, I shall offer two or three great authorities, and one of equal age and authority with Lord Coke. In the cases that were cited at the bar, it was determined by Lord Chief Justice Holt and Lord Macclesfield, that a fine was a feoffment upon record, when the party had such an estate as will entitle him to levy a fine, that is an estate of freehold; otherwise a fine has no effect whatsoever with respect to a stranger, and operates as an estoppel only, and bars none but the party claiming under it.

As to the authority I promised, which was equal to the authority of Lord Coke, it is Lord Coke himself, who in the page before that of the case cited, Co. Lit. 9 a, has these expressions: a feoffment is the most ancient and sure way of conveyance, both for that it is solemn and public, and therefore best proved, and also for that it cleareth all disseisins, &c., which cannot be done even by fine and recovery; so that it is Lord Coke's own opinion, that a feoffment can effect that which a fine and recovery cannot, and therefore it cannot longer be maintained, that he has laid it down, a fine is to all purposes a feoffment upon record.

It was said that if a fine was void in this case, how would it make a forfeiture; there are sure many cases where an act may be void as against another, and yet be a forfeiture to the person. I will give one instance, that of a copyhold tenant: a lease made by him is certainly void against the lord, and yet is a forfeiture. Upon the whole we are of opinion that the fine and recovery were no bar to the remainders.[1]

[1] s. c. Willes, 327.

DOE d. WILLIS *v.* MARTIN.

King's Bench. 1790.

[*Reported* 4 *T. R.* 39.]

This was an ejectment for some premises in the Isle of Wight on the joint and several demises of Richard Legg Willis, James Willis, Bethia Ann Willis, and Mary Willis. And on the trial at the Summer Assizes at Winchester, 1789, before *Buller*, J., a special verdict was found, stating in substance as follows: —

That Bethia Legg, being seised in fee of the premises in question, on her intended marriage with Richard Willis, by deeds of lease and release, dated the 14th and 15th of February, 1757, between Richard Willis of the first part, Bethia Legg of the second part, and Peter Bracebridge and Robert Willis of the third part, conveyed to Bracebridge and Robert Willis and their heirs to the use of herself in fee till marriage, and afterwards, to her sole and separate use for life, without impeachment of waste, and not to be subject to the control or debts of her husband; remainder to the use of Richard Willis for life, without impeachment of waste; remainder to the use of all and every the child or children or such of them of Richard Willis and Bethia for such estates and interest, &c., and in such parts, shares, and proportions as Richard Willis and Bethia should by deed appoint, and for want of such appointment, then to the use of the child or children of Richard Willis and Bethia in such parts, shares, and proportions, and for such estates and interest, as the survivor of them should by deed or will appoint, *and for want of such appointment, then to the use of all and every the child or children, equally, share and share alike*, to hold the same, if more than one, *as tenants in common*, and not as joint-tenants, *and if but one child, then to such only child, his or her heirs or assigns forever;* and in default of such issue, then to the use of the survivor of Richard Willis and Bethia in fee. [The deed contained a proviso for the revocation of the uses, the statement of which is omitted. — Ed.]

The verdict then set forth that on the 3d March, 1757, the marriage between Richard Willis and Bethia Legg took effect; and that they had several children; (to wit) Richard Legg Willis, their eldest son and heir, James Willis, Bethia Ann Willis, and Mary Willis, the lessors of the plaintiff; and also one Thomas Willis, since deceased. [Facts as to an alleged revocation under the above-mentioned proviso were stated in the verdict, but are here omitted. — Ed.]

The verdict then stated that in Hilary Term 9 Geo. III. [1769] a fine *sur conusance de droit come ceo*, &c., was levied of the premises in question by Richard Willis and Bethia his wife to Joseph Martin. That on the 21st of December, 1775, Joseph Martin by will devised to the defendants and their heirs upon certain trusts therein mentioned, and

died in March, 1776; on whose death the defendants entered, &c. In 1778 Bethia Willis died; and in 1780 the first-mentioned Richard Willis also died, without making any appointment by virtue of the power contained in the release of February, 1757. On Richard Willis's death Richard Legg Willis was beyond the seas, and did not return till the latter end of the year 1785; James Willis was then an infant, of the age of 19 years; Bethia A. Willis was of the age of 18 years; and Mary Willis is still an infant. Thomas Willis, having survived Richard Willis and Bethia, died in 1782, being then an infant; after whose death and within five years next after, Richard Legg Willis returned to this country, and James Willis and Bethia A. Willis attained their respective ages of 21 years, and before the time when, &c., they the said Richard Legg Willis, J. Willis, B. A. Willis, and M. Willis, in due form of law entered, &c., in order to avoid the fine; and thereupon became seised, &c., and being so seised, caused an action to be commenced for trying the title, &c., within one year next after such entry, which action is now prosecuting with effect, according to the form of the Statute, &c. And after such entry, and while they were seised, they demised to the plaintiff, &c., who entered, and was possessed thereof until the defendants entered and ejected him, &c. But whether, &c.

This verdict was argued three several times; first by *Jekyll* for the plaintiff, and *Gibbs* for the defendants, in Hilary Term, 1790; a second time by *Watson*, Serjt., for the plaintiff, and by *Lawrence*, Serjt., for the defendants, in Easter Term last; and on this day by *Morris* for the plaintiff, and *Wilson* on behalf of the defendants.

Lord Kenyon, C. J. The principal question in this case is, Whether the remainders to the children of Robert and Bethia Willis were vested or contingent? if the latter, it cannot be disputed but that the destruction of the particular estate on which they depended, before they became vested, would destroy them. One argument which has been used is, that the estate limited to the trustees was an use executed in them, for that otherwise the estate limited to the wife for her sole and separate use would not be secured to her, but would be under the husband's control. But in answer to that it is sufficient to observe, that it is limited to the trustees, without saying "to and *to the use* of the trustees." If none of the limitations of the settlement could possibly take effect without this construction, I should be inclined so to decide it; as was done some years ago in a case in the House of Lords. But that is not the case here; for this estate was limited to Bethia Willis and to her heirs *until* the marriage should be solemnized; it was therefore intended that the legal estate should not be taken out of her unless the marriage took effect. Besides the Court of Chancery would consider the husband, if it vested in him, a trustee for the wife, so that she might have all the benefit intended by the marriage settlement. If the remainders to the children of R. and B. Willis were contingent, the objection made by the defendants, that the conveyance by Willis and

his wife and the fine, by destroying the particular estate before they vested, also destroyed those remainders, must prevail; for it is too late, as the law now stands, to say that such is not the established doctrine of contingent remainders. This doctrine indeed involves in it difficulties which have been frequently felt by wise and able lawyers, who have wished to break through the rule; but they have been deterred from the attempt by a consideration of the consequences that might possibly ensue. There are two instances, it is true, where the law is otherwise: in equitable estates, where the contingent remainders are not destroyed, because the estate is vested in trustees to preserve the contingent remainders; and in copyholds, where the estate in the lord of the manor will support all the remainders: but in the case of freehold estates of inheritance, the rule is so established that it is not now to be shaken. On the first question in this case our judgment must depend on the authorities cited; the three leading of which are *Lovie's Case* [10 Co. 78 a], *Walpole* v. *Lord Conway* [Barnard. Ch. 153], and *Cunningham* v. *Moody* [1 Ves. Sr. 174]. Of the first, inserted in Rolle's Abridgment, which was published under the inspection of Sir M. Hale, it is sufficient to say, that it was held in a case circumstanced like the present, that the remainder was contingent. This was also adopted in a great measure by Lord Hardwicke, in *Walpole* v. *Lord Conway*. But I am happy to find that, in the last of those cases, *Cunningham* v. *Moody*, where the same point arose, and where Lord Hardwicke had an opportunity of reconsidering this question more fully and at a time of life when his judgment was more mature, that great judge determined differently. And I cannot find any *substantial* distinction between that case and the present. There Lord Hardwicke (after saying that the fee was not in abeyance) added, "nor does the power of appointment make any alteration therein; for the only effect thereof is that the fee which was vested was thereby subject to be devested if the whole were appointed." Now in this case the limitations to the children were first subject to a power of appointment, but for want of such appointment to the children *in fee* (I say in fee, as I shall show in the course of my opinion). And whether the limitations precede or follow the power of appointment, it makes no difference. The object of the parties here was to make the whole estate subject to the power and will of the parents, according to the situation and exigencies of the family. I therefore say, in the words of Lord Hardwicke in *Cunningham* v. *Moody*, that the fee was vested in the children, subject however to be devested by the execution of the power of appointment. The opinion of Lord Hardwicke in the latter case is peculiarly deserving of attention, because when it was discussed, the former one of *Walpole* v. *Lord Conway*, where he had intimated a different opinion, was strongly pressed upon him, and because too he decided the last case at a time when he had the assistance of some of the most eminent lawyers who ever attended the bar of that court. I cannot therefore forbear thinking that, on the authority of that case,

we ought to decide that the remainders to the children were vested, subject nevertheless to be devested by the parents executing the power of appointment. No appointment has been made; and therefore at the time when the acts stated in the verdict were done by the parents in opposition to the interests of their children, the limitations to the children were not destroyed. This decision puts an end to this cause as far as respects all the children but one; but it has been contended that they only took estates for life, and that, one being since dead, the reversion in fee of the parents immediately came into possession. And that brings me to the next question, whether the children took estates for life or in fee, which arises on these words: "and for want of such appointment, then to the use of all and every the child or children, equally, share and share alike, to hold the same, if more than one, as tenants in common, and not as joint-tenants, and if but one child, then to such only child, his or her heirs or assigns forever." And the question is, whether the words "his or her heirs" may not with propriety, and ought not, considering the whole settlement and the manifest intention of the parties, to act as words of limitation on all the preceding words in the sentence; I cannot bring myself to doubt but that they may. By putting the stops, or using the parenthesis, as pointed out by the plaintiff's counsel, it becomes perfectly clear. And we know that no stops are ever inserted in Acts of Parliament, or in deeds; but the courts of law, in construing them, must read them with such stops as will give effect to the whole: if then we use the points suggested by the counsel, the clause will read thus, "to the use of all and every the child or children, equally, share and share alike, his or her heirs or assigns forever." If this had been like the case of *Hay* v. *Lord Coventry*, 3 T. R. 83, we might have lamented that the parties had not inserted words of inheritance to carry their probable intent into execution, but we could not have supplied them. But in this case there are words of inheritance; and I think we should defeat the manifest intention of the parties, and the object of the settlement, which was to give the children estates of inheritance, were we not to read this part of it in the manner contended for by the plaintiff's counsel.

BULLER, J. This case has been so fully discussed both on the bench and at the bar, that I will content myself with stating the general grounds of my opinion.

With respect to the first and principal question, the argument on the part of the defendants, as far as authorities are concerned, rests on *L. Lovie's Case*, and on that of *Walpole* v. *Lord Conway*. But what was said by Lord Coke in the former case certainly did not apply to the point before the court; the question there arose on the will only; and nothing was said either in argument or by any other of the judges on the construction of the deed. The same case is also reported in Moor. 772; where it appears that the remainder under the will was contingent, because it could not arise unless the eldest son died without issue, *and* there was *also* an alienation. Therefore I think it did not

occur to Lord Coke that a remainder, when once vested, could be afterwards devested by the execution of the power. If there were no authority against this case, I could not have made up my mind to agree to it; but his opinion has been since controverted in other cases. In 2 Lord Raym. 1150, Mr. J. Powell, speaking of *L. Lovie's Case*, said, "Though it was a doubt in *L. Lovie's Case*, whether a remainder could be limited after a contingent fee, yet it is none now. And therefore if a fee-simple be limited to such persons as A. shall appoint by his will, remainder over, that is a good remainder vested till the appointment." Now the instance there put is directly this case; and if the limitations to the children were vested on the birth of a son, nothing has since happened to devest them. The defendants' counsel have rather hinted at, than insisted on, a difference between this case and that put by one of the plaintiff's counsel, of a remainder to the first and other sons of A. with a remainder to the first and other sons of B. his brother, where, on the birth of B.'s son before A. had any son, the remainder would vest in the former, subject to be devested on the birth of a son of A.: but I see no distinction; for when a child of Robert and Bethia Willis was born, the limitation was vested in him exactly in the same manner as if the limitation had been to their first and other sons. If there had been no power of appointment, the limitation to the children would have vested on the birth of a child: that was the point decided in *Lewis Bowles's Case*. Then suppose the limitation to the children had been *followed* by a proviso containing a power of appointment, that would not have varied the case: if so, what difference is there, either in reason or in law, whether the power of appointment be inserted in one part of the instrument or the other? The court must consider the *whole deed* together in order to collect the intention of the parties. As to the *quantum* of interest which the children took, that question also seems equally clear. Suppose the limitation were to "all and every the children, and *his* or *her* heirs and assigns forever:" that would not be grammatically written, but the intention of the parties being manifest, the court must read it thus, *his*, *her*, *or their* heirs and assigns forever. This question arises on a family settlement, which was made for the benefit of all the children of the marriage; and in order to give effect to the intention of the parties, we may leave the intervening words in a parenthesis, by which means the word "heirs" will have relation to the words in the former part of the sentence.

GROSE, J. If my Brother BULLER found the case so much exhausted as to make it unnecessary for him to go fully into every part of it, much less necessary is it for me to do so. The first considerable question is, whether the remainder to the children, which was certainly contingent in its creation, did or did not become vested in the children as they came *in esse*. I confess I was at first forcibly struck with *L. Lovie's Case*, and *Walpole* v. *Lord Conway*, as also with the common definition of a contingent remainder. But I think that the rule laid down in *Cunningham* v. *Moody* is the best and wisest con-

struction; and there the rule is "that a remainder may vest, liable to be devested by the execution of a power of appointment." The ground of it is, that the courts will never suffer the fee to be in abeyance but from necessity. And I am the more inclined to adopt this rule, as being the most likely to give effect to the intention of the parties; which the contrary doctrine would probably defeat. Therefore I think that on the birth of the children the limitations to them became vested;[1] and as to the *quantum* of estate which they took, I have not a particle of doubt. By reading the words in the mode adopted by the court, all the difficulty is removed.[2]

DOE d. HARRIS *v.* HOWELL.

King's Bench. 1829.

[*Reported* 10 *B. & C.* 191.]

Bayley, J.[3] This case was founded upon the will of John Ley. By that will he devised to his daughter Elizabeth, the wife of William Harris, for life, remainder to William Harris for life, remainder to John, his daughter's son, and his heirs and assigns forever; but in case he should die before the testator's daughter, Elizabeth Harris, and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person or persons as she should think proper. The testator died in February, 1763, and John, the daughter's son, in April following. In January, 1766, the daughter had another son, William, the lessor of the plaintiff. In November, 1770, William Harris died; and in December, 1772, his widow married again. In Hilary Term, 1773, she and her second husband levied a fine with proclamations of the premises in question: and the case depends upon the effect of that fine. If that fine barred

[1] "Where the estate is limited to a number of children, it shall vest in the first, and afterwards open for the benefit of those who shall be born at a subsequent period." — *Per* Buller, J., in *Doe* d. *Comberbach* v. *Perryn*, 3 T. R. 484, 495 (1789). See Gray, Perpetuities, § 110. — Ed.

[2] The opinion of Ashhurst, J., in concurrence, is omitted, as also those parts of the other opinions which deal with the question of the revocation of the uses of the settlement. It was *held* by all the judges that there was no revocation.

"With regard to the case of *Walpole* v. *Conway*, which was mentioned in *Willis* v. *Martin* as being contrary to another decision of Lord Hardwicke in *Cunningham* v. *Moody*, and which was pressed upon us in *Willis* v. *Martin*, a further account of it has been found among the papers of the late Sir T. Sewell, from which it clearly appears that Lord Hardwicke ultimately gave directions in it conformable to what he had done in *Cunningham* v. *Moody*. I am therefore perfectly satisfied with the decision of *Willis* v. *Martin*; and though a writ of error was brought to reverse our judgment in that case, it was afterwards *non-pross'd* in the House of Lords." — *Per* Lord Kenyon, C. J., in *Doe* d. *Tanner* v. *Dorvell*, 5 T. R. 518, 521 (1794).

See *Smith* v. *Camelford*, 2 Ves. Jr. 698, 703–707 (1795).

[3] The opinion only is here given.

the lessor of the plaintiff, the defendant is entitled to the property; if it did not bar him, the property is his. In May, 1819, the testator's daughter Elizabeth died, and a proper entry was made to avoid the fine. The daughter was John Ley's heir. At the time, therefore, when the fine was levied (John the devisee in fee being dead, and William Harris being dead), the only parts of the will which continued capable of operating, were the devise to the daughter for life, and the devise over in case she should have no other child living at her death, that she might give and devise the property as she should think proper.

The question whether the plaintiff's title is barred by the fine levied by his mother Elizabeth, depends upon the quality and character of the power given to her by the will to give and devise the premises after her own death, in case she shall have no other child living at her death. If this be considered as an executory devise, the fine did not bar it; and the lessor of the plaintiff is entitled to recover. If it be considered as a contingent remainder, it was defeated by the fine.

It is a maxim of law, that no limitation shall be considered as an executory devise which may be good as a remainder, the law favoring the alienation of property. In the present case, it is clear that at the death of the testator, and until the death of his grandson John, this limitation could avail only as an executory devise; and this not for want of a freehold interest to support it, but by reason of the previous gift of the whole fee to the testator's grandson John, if he had survived his mother. Upon the death of John, this necessity and the reason of it ceased, and the lands then stood limited to Elizabeth for life, remainder to her husband for life, with a power to her to give and devise the fee if she should have no other child living at her death. In this state of facts, therefore (that is, upon the death of John), we think the character and quality of this limitation changed, and it became a contingent remainder. This appears to us to be conformable to the principle upon which executory devises are allowed, viz. the necessity to give effect to the intention of a testator.

In *Stephens* v. *Stephens*, Cas. temp. Talb. 228; Fearne, 519, the testator devised to his grandson William Stephens, his heirs and assigns forever (after the death of the testator's wife), but if William should die under twenty-one, to his grandson Thomas and his heirs; but if he should die under twenty-one, to such other son of the father and mother of William and Thomas as should attain twenty-one, in tail male, remainder to the daughters of their father and mother in tail general, remainder to Sir Richard Stephens in fee. William and Thomas both died under twenty-one; their father and mother had another son and daughter, Sarah and Thomas, and it was held by the Court of King's Bench, Lord Hardwicke then being Chief Justice, that the limitation to such other son as the father and mother of William and Thomas should have (there being no freehold to support it) was good by way of executory devise; and that if the limitation to their

sons and daughters in tail should fail, the estate would go to Sir Richard Stephens, by virtue of the remainder to him in fee. Lord Chancellor Talbot decreed according to this decision, and expressed his satisfaction with it as agreeing with his own sentiments. Mr. Fearne observes upon this case, that until the estate vested in some son (of the father and mother of William and Thomas) who attained twenty-one, the limitations over to the daughter and Sir Richard Stephens must have been executory devises; but as soon as ever the estate should become vested in a son, then those subsequent limitations must, of course, have taken effect as vested remainders. In *Hopkins* v. *Hopkins*, Cas. temp. Talb. 44; Fearne, 304, 525, there was a devise in trust for B. for life, remainder to his first and other sons successively in tail male, remainder to the future sons of C. successively for life, remainder over. B. died in the life of the testator, and C. had no other son until some time after the testator died: it was held, that if the fee had not been in the trustees, B.'s death in the testator's lifetime would have made the limitations to the future sons of C. executory devises; but that as soon as C. had another son, and the executory devise having thereby vested, the subsequent limitations would have ceased to have been executory devises, and would have been contingent remainders; but C.'s son having died before any other estate vested, and the question being raised, Whether the limitations over, prior to D.'s were not destroyed? it was decreed by Lord Chancellor Talbot that the legal estate was in the trustees, and protected those which would otherwise have been contingent remainders from destruction; and that decision was afterwards acted upon by Lord Hardwicke. That case, therefore, shows that limitations, which had previously been considered as executory devises, by the birth of a son (intended to be the first taker), became contingent remainders. And if an executory devise shall become a contingent remainder by the birth (of a person capable of taking) happening after the death of the testator, the same change must, by parity of reason, take place on the death of the person whose interest alone caused the limitation to be considered as an executory devise.

That a limitation in a will which, at the time of making it, could only have operated by way of executory devise, may, by change of circumstances in the testator's lifetime, operate at his death so as to give a vested estate in possession, or a vested remainder, or a contingent remainder liable to destruction, is laid down distinctly by Mr. Preston in his book upon Abstracts, vol. ii. page 154, and it will be found upon examination that a change of circumstances after the testator's death, may change the character of a particular limitation, and make it operate at one time as a remainder, at another as an executory devise, and *e converso* at one time as an executory devise, at another as a remainder.

And in Fearne's Essay on Contingent Remainders abundant proof will be found that where a limitation, which causes subsequent limita-

tions to operate by way of executory devises, is removed, the subsequent limitations, if they do not give an estate in possession, will operate either by way of vested or contingent remainder, as they would have done had that limitation which made the others operate by way of executory devise never existed. In page 506, Mr. Fearne says: "But here an observation is to be attended to, that notwithstanding the rule that if one limitation be executory, every subsequent one must be so likewise, yet a preceding executory limitation may be uncertain and contingent, when a subsequent one may be so limited, as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest: should the preceding limitation fail, the subsequent one will then vest in possession; should it take effect, the subsequent one will at the same instant vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction, as other remainders of the same kind are subject to." And in addition to the cases I have mentioned of *Hopkins* v. *Hopkins*, and *Stephens* v. *Stephens*, Mr. Fearne adduces in different parts of his work, in illustration of the same doctrine, the cases of *Brownsward* v. *Edwards*, 2 Ves. 243, and *Gulliver* v. *Wickett*, 1 Wils. 105.

In *Gulliver* v. *Wickett*, the testator devised to his wife for life, remainder to the child his wife was then supposed to be pregnant with, and his heirs, but if he should die under twenty-one and without issue, then to B. and his heirs. This was held to be a good devise to the wife for life, with contingent remainder to the child in fee, with a good executory devise to B. in fee; and if the contingency of a child never happened, that the remainder to B. would take effect upon the death of the wife; and it will be seen that it would take effect as *an ordinary remainder*.

In *Brownsward* v. *Edwards*, 2 Ves. 243; Fearne, 506, where an estate was devised to B. and the heirs of his body if he attained twenty-one, but if he died under twenty-one, and (construed "or") without issue, and he attained twenty-one, but died without issue, Lord Hardwicke held that the remainder over would have inured by way of executory devise had B. died without issue under twenty-one, yet as he did not die till after the estate vested in him, the limitation over went by way of remainder.

From these authorities we think it clear that a change of circumstances after the death of the testator may convert into a remainder what at the death of the testator and without such change could only have operated by way of executory devise, and that this will be the case where that limitation which alone would make the others executory devises is become incapable of taking effect; and if this be so, this case is clear. For at the time this fine was levied, the only vested estate was in Elizabeth the testator's daughter, and her husband in her right, and the only other interest was a contingent remainder in favor

of any child or children she should leave at her death, and that remainder the fine destroyed. For these reasons, we think the verdict must be entered for the defendants, according to the reservation in the case.

Postea to the defendant.

Busby, for the plaintiff.
Shutt, contra.

FESTING *v.* ALLEN.

EXCHEQUER. 1843.

[*Reported* 12 *M. & W.* 279.]

ROLFE, B.[1] This case, sent for the opinion of this court by his Honor, *Vice-Chancellor Wigram*, was very fully argued in last Easter and Trinity Terms. The authorities cited were very numerous, and it was rather from a desire to look into them more attentively than it was possible to do at the time of the argument, than from our entertaining much doubt in the case, that we took time before delivering our judgment.

The question for our opinion arises on the will of Roger Belk, which, so far as it is material to state it, is as follows: "I give and devise unto George Allen, Thomas Youle, and John Gillatt, all and every my messuages, lands, tenements, and hereditaments, both freehold and copyhold, and all my other messuages, lands, tenements, hereditaments, and real estate whatsoever and wheresoever, to have and to hold the same unto the said George Allen, Thomas Youle, and John Gillatt, their heirs and assigns, to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and declarations hereinafter expressed and contained of and concerning the same; viz., to the use of my said dear wife and her assigns, for and during the term of her natural life, if she shall so long continue my widow and unmarried, without impeachment of waste; and from and after her decease or second marriage, which shall first happen, to the use of my said granddaughter, Martha Hannah Johnson, and her assigns, for and during the term of her natural life, and from and after her decease to the use of all and every the child or children of her, the said Martha Hannah Johnson, who shall attain the age of twenty-one years, if more than one, equally to be divided amongst them, share and share alike, to hold as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns forever, and if but one such child, then to the use of such one child, his or her heirs and assigns forever; and for want of any such issue, then it is my will and mind, and I do hereby direct, that my said trustees, and the survivor of them, and the heirs and assigns of such survivor, do and shall

[1] Only the opinion is here given.

stand seised and possessed thereof, in trust, as to one equal half part or share thereof, to permit and suffer Ann Johnson, the wife of my grandson Thomas Roger Belk Johnson, or any other wife whom he may happen to marry, to receive and take the rents, issues, and profits thereof, for and during the term of her natural life, for the maintenance and education of all and every the child or children of my said grandson Thomas Roger Belk Johnson; and from and after her decease, to the use of all and every the child and children of my said grandson, Thomas Roger Belk Johnson, lawfully begotten, who shall attain the age of twenty-one years, if more than one, equally to be divided amongst them, share and share alike, to hold as tenants in common, and not as joint tenants, and to their several and respective heirs and assigns forever; and if but one such child, then to the use of such one child, his or her heirs and assigns forever. And as to the other equal half part or share thereof, to stand seised and possessed thereof to the use of the said Sarah Rhodes, for and during the term of her natural life, and from and after her decease, to the use of all and every the child or children of the said Sarah Rhodes, lawfully begotten, who shall attain the age of twenty-one years, if more than one, to be equally divided amongst them, share and share alike, to hold as tenants in common and not as joint tenants, and to their several and respective heirs and assigns forever."

Martha Hannah Johnson survived the testator's widow, and after his death, namely, in the year 1825, married Maurice Green Festing. She died in 1833, leaving three infant children; and the main question is, whether those children took on her death any interest in the devised estates.

We think that they did not. It was contended on their behalf that they took vested estates in fee immediately on the death of their mother, subject only to be devested in the event of their dying under twenty-one, and the case, it was said, must be treated as coming within the principle of the decision of the House of Lords in *Phipps* v. *Ackers*, 3 Cl. & Fin. 703, and the cases there referred to. To this, however, we cannot accede. In all those cases there was an absolute gift to some ascertained person or persons, and the courts held, that words accompanying the gift, though apparently importing a contingency or contingencies, did in reality only indicate certain circumstances on the happening or not happening of which the estate previously devised should be devested, and pass from the first devisee into some other channel. The clear distinction in the present case is, that here there is no gift to any one who does not answer the whole of the requisite description. The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one, and no one who has not attained his age of twenty-one years is an object of the testator's bounty, any more than a person who is not a child of Mrs. Festing. Even if there were no authority establishing this to be a substantial and not an imaginary distinction, still we should not feel inclined to extend the

doctrine of *Doe* v. *Moore*, 14 East, 601, and *Phipps* v. *Ackers* to cases not precisely similar. But, in fact, the distinction to which we have adverted in a great measure forms the ground of the decision in the case of *Duffield* v. *Duffield*, 3 Bligh, N. S. 20, in the House of Lords, and *Russell* v. *Buchanan*, 2 C. & M. 561, in this court; and on this short ground our opinion is founded. We think that Mrs. Festing was tenant for life, with contingent remainders in fee to such of her children as should attain twenty-one; and as no child had attained twenty-one when the particular estate determined by her death, the remainder was necessarily defeated. It is equally clear that all the other limitations were defeated by the same event, namely, the death of Mrs. Festing leaving several infant children, but no child who had then attained the age of twenty-one years. For the limitations to take effect at her decease were all of them contingent remainders in fee, one or other of which was to take effect according to the events pointed out. If Mrs. Festing had left at her decease a child who had then attained the age of twenty-one years, her child or children would have taken absolutely, to the exclusion of all the other contingent remainder-men. If, on the other hand, there had at her decease been a failure of her child or children who should attain twenty-one, then the alternative limitations would have taken effect; but this did not happen, for though she left no child of the age of twenty-one years, and therefore capable of taking under the devise in favor of her children, yet neither is it possible to say that there was at her decease a failure of her issue who should attain the age of twenty-one years, for she left three children, all or any of whom might and still may attain the prescribed age; so that the contingency on which alone the alternative limitations were to take effect had not happened when the particular estate determined, and those alternative limitations, all of which were clearly contingent remainders, were therefore defeated. On these short grounds, we think it clear, that neither the infant children of Mrs. Festing, nor the parties who were to take the estate in case of her leaving no child who should attain twenty-one, take any interest whatever, but that on her death the whole estate and interest vested in the heir-at-law.

We shall certify our opinion to Vice-Chancellor Wigram accordingly.[1]

Malins, for the infant children of Martha H. Festing.

Smythe, for Ann Johnson and all the representatives of Thomas Roger Belk Johnson.

Butt, for Mrs. Rhodes and her children.

W. T. S. Daniel, for the devisees of the heir-at-law.

[1] See, *accord.*, *Bull* v. *Pritchard*, 5 Hare, 567 (1847); *Holmes* v. *Prescott*, 33 L. J. Ch. 264 (1864); *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532 (1865). *Contra*, *Browne* v. *Browne*, 3 Sm. & G. 568 (1857).

EGERTON *v.* MASSEY.

COMMON PLEAS. 1857.

[*Reported* 3 *C. B. N. S.* 338.]

COCKBURN, C. J.[1] I am of opinion that the defendants are entitled to the judgment of the court. The action is brought to try the right to property devised by the will of one Elizabeth Glover, who died seised in fee-simple. The devise was to the testatrix's niece Eunice Highfield, for life, with remainder to her children in such shares as she should appoint, with remainder, in default of issue of Eunice, to her nephew, Peter Highfield, in fee. And the will contained a residuary clause, whereby the testatrix gave and bequeathed all the residue and remainder of her estate and effects, whatsoever and wheresoever, not thereinbefore disposed of, unto her said niece Eunice Highfield, her heirs and assigns, forever. It appears that, after the death of the testatrix, Eunice Highfield by lease and release of the 1st and 2d of October, 1832, conveyed the premises in question to one Peter Jackson, in fee; and the question is, whether that is a valid conveyance, or whether the testatrix's nephew Peter Highfield,— Eunice Highfield, the tenant for life, having died without issue,— became entitled to the estate. That question turns upon whether by the conveyance to Jackson the life-estate of Eunice Highfield became merged in the reversion, so that, by the failure of the particular estate upon which the contingent remainder of Peter Highfield depended, the contingent remainder was destroyed. I am of opinion that that is the true state of things. The testatrix first creates a life estate in Eunice Highfield, and then gives a contingent remainder to Peter Highfield, leaving the reversion in fee undisposed of, except for the residuary clause. It is clear that the fee thus undisposed of must have remained somewhere, and that it was not the mere shadowy interest which Mr. Shapter by his very ingenious argument sought to persuade us. The fee, then, being somewhere, what would become of it? If it had remained undisposed of, it would have gone to the heir-at-law of the testatrix. But we find that the testatrix by the residuary clause professes to dispose of it; for she thereby gives all the residue and remainder of her estate not before disposed of, to her niece, in fee. If, therefore, the fee did not pass — as, I think, it did not — by the creation of the contingent estate, then it would appear to follow that it must be included in the residuary devise, the words of which are large enough to embrace it; and, that being so, the effect of the conveyance of 1832 was, to pass not only the life estate, but also the reversion, and, by the merger of the particular estate, on which the contingent remainder depended, in the reversion,

[1] The opinions only are here given.

to destroy the contingent remainder. The only difficulty suggested upon this was, whether an estate of this kind must not be made the subject of a specific devise. No authority, however, was cited for that proposition: and, *prima facie*, and upon the reason of the thing, if a testator leaves the fee undisposed of by the earlier part of his will, and by a residuary clause professes to deal with "all the residue and remainder of his estate and effects whatsoever and wheresoever, not thereinbefore disposed of," it follows as of course that the fee passes by that. It was said, that, although this would be so as to *personalty*, a different rule prevails as to *realty;* but no authority was cited in confirmation of that view: and we have the authority of two very eminent conveyancers, — Mr. Preston and Mr. Hayes, — who seem to take it for granted that *all* estates previously undisposed of by the will pass by the residuary clause. I am therefore of opinion, that, there being this estate of fee in the testatrix, which, unless disposed of, would have passed to her heir-at-law, and she having disposed of it by the residuary clause in terms capable of passing it, and the estate for life and the reversion in fee being thus united in Eunice Highfield, and she having conveyed the whole of her interest to Peter Jackson, the particular estate became merged in the fee, and the contingent remainder in favor of Peter Highfield was consequently destroyed. For these reasons I think there must be judgment for the defendants.

Williams, J. I am entirely of the same opinion. The learned counsel who argued for the plaintiffs rested his case upon the position that the residuary clause in the will could not operate as a devise of the reversion in fee, because it would be a violation of the rule of law that a fee cannot be limited on a fee. The obvious meaning of that is, that, where an estate is so devised that the fee, whether absolute or determinable, is vested in the first taker, the subsequent dispositions cannot be good by way of remainder, but must operate by way of executory devise. And that is reasonable, because, the fee having been given and passed by the first devise, there is nothing further for the subsequent limitations to operate upon. But that rule is wholly inapplicable to a case like this, where all is in contingency, and the fee is outstanding. If the fee be outstanding, where is it? It is clear that the notion of the fee being in abeyance cannot now be sustained: see *Purefoy* v. *Rogers*, 2 Wms. Saund. 380, 2 Lev. 39, 3 Keble, 11; *Plunkett* v. *Holmes*, 1 Lev. 11, 1 Sid. 47, T. Raym. 28; *Carter* v. *Barnardiston*, 1 P. Wms. 511; but the fee descends to the heir-at-law, to let in the contingency if it happens. I think it is clear, that, if the will had contained no residuary clause, the fee would have descended to the heir-at-law. The question, then, resolves itself into this, whether the residuary clause passes this reversion in fee, which but for such residuary clause would have descended to the heir-at-law. Some passages have been cited from the works of two very eminent conveyancers, which treat it as quite plain that such an estate would pass by a residuary clause. The estate for life did not merge in the fee so long as both remained in the

devisee: but they both became united by the conveyance to Peter Jackson. I therefore think the defendant is entitled to our judgment.

The rest of the court concurring,

Judgment for the defendants.[1]

Shapter (with whom was *E. Beavan*), for the plaintiffs.

Joshua Williams (with whom was *Hugh Hill*), for the defendants.

PRICE *v.* HALL.

CHANCERY. 1868.

[*Reported L. R.* 5 *Eq.* 399.]

GEORGE HALL, by his will, dated the 28th of February, 1839, bequeathed his personal estate to his wife absolutely for her own use, benefit, and disposal, and all his real estate, for and during the term of her natural life, chargeable with the payment of debts and expenses, and £15 yearly and every year during his natural life unto his grandson William Hall, and to his children equally after his death. "And as to my said real estates, after the death of my wife I give, devise, and bequeath the same equally to the child or children of my said grandson William Hall, if he leave any him surviving, but in case he leave no child or children him surviving, I give, devise, and bequeath my said real estates, or the residue thereof, unto the children or child of my cousin, Jonas Wilman, of Althorpe, the said Jonas Wilman and his wife first taking the income thereof yearly and every year during his life."

The testator died in March, 1843. Mary Hall, his widow, died in June, 1855, leaving William Hall her surviving.

At the date of testator's death William Hall had no children living, but five children had since been born to him, of whom three were living at the death of the testator's widow, Mary Hall, the tenant for life, the other two having been born since her death.

The bill was filed by the children of William Hall for the purpose of ascertaining the rights of all parties; and it was prayed that the income of the infants' shares might be applied for their maintenance and education, and the back rents accounted for by William Hall, who was in possession.

At the hearing the Vice-Chancellor allowed the two children of William Hall born after the death of Mary Hall to be added to the record as defendants.

Mr. Freeman, for the plaintiffs, the three children of William Hall living at the death of the tenant for life.

Mr. Faber, for the children of Jonas Wilman and the two after-born children of William Hall.

Mr. Winterbotham, for William Hall and his mortgagee.

[1] See Gray, Perpetuities, § 113 *a*.

Sir W. Page Wood, V. C. The question is, whether the estate vested in the children of William Hall, subject to be divested in the event of William Hall dying without leaving any child or children living at his death, or whether it is an interest in the children contingent upon William Hall dying in the lifetime of the testator's widow, the tenant for life, which contingency has not taken effect by reason of the tenant for life having pre-deceased William Hall. It is clear that in neither view could the children of Jonas Wilman take. The case was very ably argued by Mr. Freeman, who relied upon that class of cases where it has been held that upon a gift to A. when or if he shall live to attain twenty-one, followed by a limitation over in case he die under that age, the devise over is considered as indicating that he is to take all that is not given over in the given event, and that in such a case the interest vests immediately, though not absolutely and indefeasibly, until A. attains twenty-one. But there is another class of cases, of which *Festing* v. *Allen*, 12 M. & W. 279 — which, although it has been called in question (see *Browne* v. *Browne*, 3 Sm. & Giff. 568), has not been overruled — is an instance, viz., that if you attach to a legatee a description so that the legatee cannot be ascertained but for that description, which contains in itself a contingency; then until the contingency happens you have no legatee to answer the whole of the requisite description, and no one to whom the doctrine laid down in *Edwards* v. *Hammond*, 3 Lev. 132, and that class of authorities, can apply. In all the cases cited in favor of vesting, the gift was to children on their attaining a particular age, and the only words of contingency were that, if the particular age was not attained, the estate was to go over, the effect of which was that, although the estate vested immediately, it did not vest indefeasibly until the particular age had been attained. But in this case the contingency which is introduced does not fit in with the prior interest given. *Doe d. Roake* v. *Nowell*, 1 M. & S. 327, affirmed in Dom. Proc. (5 Dow. 202), is always referred to by those who disapprove of *Festing* v. *Allen*. There, however, all the class was distinctly ascertained and indicated, and it would be going far beyond the authority of that case, or even *Browne* v. *Browne*, to hold in this case that the children took vested remainders liable to be divested in the given event. It is not here a gift to ascertained persons with a gift over, but there was a clear intention on the part of the testator that the class should not be ascertained until the death of William Hall, and that all those children who survived him (William Hall), and those only, should take. Unfortunately for the interests of the children, William Hall was not tenant for life, and has survived the person named by the testator as tenant for life, so that the particular estate to support the contingent remainder has dropped before the event on which the contingency depends has arrived. By treating it as a remainder vesting immediately in the children living at the death of the tenant for life, it might happen that those children might all die in the lifetime of William Hall, and yet be absolutely entitled, to the

exclusion of after-born children who survived William Hall. That was the very class of events which was not intended by this testator. He meant to give to any children of William Hall whom he might leave living at his death. That was the particular period pointed out for ascertaining the class, and if no children of William Hall were then living, then the property was to go over to the Wilman family. I mention, lest it should be thought that I had overlooked it, the case of *Doe d. Bills* v. *Hopkinson*, 5 Q. B. 223, which, at first sight, looks very like this case, but is not so in reality. There the devise was to T. and W. for life in equal moieties, and after their death the moiety of T. was given "to such child or children as he shall happen to leave, lawful issue, at the time of his decease, and to their, her, or his heirs and assigns forever, to take in equal shares if more than one." The gift of W.'s moiety was in similar terms, and in case either T. or W. died without lawful issue, the moiety of him so dying was given to the survivor and to J. If both T. and W. died, and neither of them left issue, the whole was given to J. for life, and after his death to such children as he should leave at the time of his death. In case all three, T., W., and J., should die without lawful issue, or if they, or any of them, should leave lawful issue, and such issue should depart this life under twenty-one and without lawful issue, then the property was given over. The court there, looking to the whole will, held that the estate of each child (of T.) in remainder vested at birth, liable only to open and let in the interests of after-born children. It must be held in this case that the limitations after the death of Mary Hall to the children of William Hall were contingent limitations, and that, as the contingency has failed, William Hall takes the estate as heir-at-law of his father. As, therefore, the plaintiffs are not entitled to any interest under the testator's will, the bill must be dismissed, and, as costs are not asked for, without costs.

ASTLEY *v.* MICKLETHWAIT.

CHANCERY DIVISION. 1880.

[*Reported* 15 *Ch. D.* 59.]

FRANCIS L'ESTRANGE ASTLEY, by his will, dated the 25th of August, 1862, after executing a power of appointment given him by the settlement made upon his first marriage in favor of the two children by his first marriage, Charlotte Laura Astley and Francis Nathaniel Astley, and after executing a power of appointment given him by the settlement made upon his second marriage in favor of the children by that marriage, subject to the life interest of his wife, gave and devised all his messuages, lands, tenements, and hereditaments in the county of Norfolk, called or known as the Saxthorpe estate, to the use and

intent that his wife, Rosalind Alicia, might, during the joint lives of herself and the testator's son, Frederick Bernard Astley, receive a yearly rent-charge of £280 to be charged and payable out of such estate, and, subject and charged as therein mentioned, to the use of Lord Walsingham, Frederick Nathaniel Micklethwait, and Jasper Henry Selwyn, their executors, administrators, and assigns, for the term of 500 years, to commence from the death of the testator, upon the trusts thereinafter declared; and from and after the expiration or determination of the said term of 500 years, and subject to the trusts thereof, to the use of his son Frederick Bernard Astley and his assigns during his life, without impeachment of waste, and from and after his decease to the use of all or such one or more exclusively of the others or other of the children of Frederick B. Astley, who being a son or sons should attain the age of twenty-one years or die under that age leaving issue him or them surviving, or being a daughter or daughters should attain that age or be married, for such estates and interest as his said son should by deed or will appoint, and in default of such appointment to the use of the child or all the children of his son Frederick B. Astley who being a son or sons should attain the age of twenty-one years or die under that age leaving lawful issue him or them surviving, or being a daughter or daughters should attain the age of twenty-one years or be married, and the heirs and assigns of such children respectively in equal shares if more than one as tenants in common. But if his said son should die without having had any son who should have attained the age of twenty-one years or should have died or should afterwards die under that age leaving lawful issue him surviving, or any daughter who should have attained or should afterwards attain the age of twenty-one years or should have been married, then, subject and without prejudice to the power of appointment lastly thereinbefore contained, to the uses therein mentioned. And the testator, after other devises, gave and devised to his son Francis Nathaniel Astley, his heirs, executors, administrators, and assigns, all his freehold, copyhold, and leasehold hereditaments not otherwise disposed of by his will.

The testator died in April, 1866, and his will was proved by F. N. Micklethwait and Jasper Henry Selwyn alone, the said Lord Walsingham having renounced probate and execution of the will.

The Saxthorpe estate, devised by the will, was wholly of freehold tenure; it contained about 1,382 acres, and was acquired by the testator by two separate purchases. By one he acquired the bulk of the estate, containing about 1,323 acres, and by the other he acquired the remaining fifty-nine acres, or thereabouts. Immediately after the execution of the conveyances of this estate the testator mortgaged the bulk of the Saxthorpe estate, containing the 1,323 acres, to the trustees of the first marriage settlement and their heirs, for securing a sum of £20,000 which they had advanced to him out of the trust funds to enable him to complete the purchase of the estate, and he executed a second mortgage

of the same portion of the estate to the trustees of the settlement upon his second marriage to secure a sum of £1,500 which they had advanced to him out of the trust funds to enable him to complete his said purchase. The latter sum of £1,500 had since the testator's death been paid off out of his personal estate, pursuant to directions in that behalf contained in the will, and the second mortgage had thereby become satisfied.

Frederick Bernard Astley, the testator's son, died in August, 1876, leaving four children, the infant plaintiffs, the eldest of whom was born in January, 1868, and he did not exercise the power of appointment of the Saxthorpe estate in favor of his children given him by the will.

The testator's son Francis Nathaniel Astley, the residuary devisee, and who was also his heir-at-law, died in August, 1868, intestate, leaving Francis Jacob Astley (an infant) his eldest son and heir-at-law and the heir-at-law of the testator.

Francis Jacob Astley claimed to have some estate or interest in the Saxthorpe estate or some part thereof.

This action was instituted to have the rights and interests of the several persons entitled or interested under the will of Francis L'Estrange Astley in the Saxthorpe estate declared, and to have the trusts of the will as to the Saxthorpe estate carried into execution.

Glasse, Q. C., and *Chapman Barber*, for the children of Frederick Bernard Astley.

J. Pearson, Q. C., and *Owen*, for the heir-at-law of the testator.

Malins, V. C. The testator had not the legal estate at the date of his will or death. His will never operated upon the legal estate. Why am I to go out of my way to destroy the will instead of preserving it? Anything that would enable the court to get out of the monstrous doctrine of *Festing* v. *Allen*, 12 M. & W. 279, ought to be adopted. You cannot have a more forcible illustration than this very case.

Malins, V. C., after reading the material parts of the will, continued: —

In a recent case of *Patching* v. *Barnett* I have expressed my dissent from the principles acted on in the case of *Festing* v. *Allen*, and I equally express my dissent from them here; but as I said there, so I say here, *Festing* v. *Allen* has become a binding authority upon me, although I think it wrong upon principle. If these had been legal limitations it would have been exactly the case of *Festing* v. *Allen*, and I should be bound on the authority of that case to say that the limitations to the grandchildren of the testator, that is, to the children of Frederick Bernard Astley, failed, because the father died while they were under twenty-one, which was the very event which happened in *Festing* v. *Allen*, where the limitation was to the granddaughter of the testator for life, and after her decease to her children who should attain twenty-one. She died while they were minors, and therefore the estate, saving contingent remainders, having failed, and they not being capable of taking effect at the latest moment at which they could take effect,

namely, at the expiration of the particular estate, failed altogether, as they would have done in this case had they been legal limitations. But it happened, fortunately I think for all parties, that in this case the legal fee was not in the testator. If he had had the legal fee, and had devised it to the trustees in this way, "I give all my lands unto and to the use of my trustees, their heirs and assigns," and then these same limitations had been repeated, they would have been contingent remainders, but they would have been contingent remainders which would have been preserved by the legal estate in the trustees. That, I think, nobody seems to doubt; but in this case the testator did not make that form of will, because he had not the legal estate. It was outstanding in a mortgagee as to the whole of the estate except fifty-nine acres, I understand. Mr. Glasse, who appears for the plaintiff, does not contest that as to the fifty-nine acres the case is governed by *Festing* v. *Allen*, and that therefore the limitation as to the fifty-nine acres fails. But with regard to the bulk of the estate, which is 1,323 acres, the legal estate being outstanding, I apprehend the effect is just the same as if the legal estate had been expressly devised by the will.

Now, I believe there is no judicial decision on this point, but certainly that has been my impression for many years, derived from consideration of the subject. It is discussed by Mr. Butler in his note on Fearne, and also, I think, in the note to Coke upon Littleton, all pointing to the same conclusion. Mr. Butler says: "It is to be observed that Fearne speaks in this place of cases where both the legal fee and the trusts are created by the same instrument; but it frequently happens that contingent remainders are created by deed or will after the legal freehold [that is a misprint, because it is legal fee, not freehold] has been vested in some other person by a previous deed or will. No case has been decided to show that such an outstanding estate will preserve the contingent remainders created by the subsequent deed. The general opinion is that it will; but if the deed vesting the legal fee in the trustee is of a very ancient date, cases may arise, in which it may be doubtful whether the long possession by the *cestui que trust*, without an acknowledgment of the outstanding legal estate, has not, in the presumption of law, divested it from the trustees so as to make it incapable of supporting the contingent remainders, by virtually depriving it of its legal existence."

That is a different point, because that would be a case where the court would presume a reconveyance of the legal estate; but where, as in this case, the legal estate is undoubtedly outstanding, then the testator devises only equitable estate, and this doctrine of the destruction of contingent remainders has no application, because they are all preserved by the outstanding legal estate; and I am therefore of opinion, on these grounds, that as to the bulk of the estate the limitations are good and will take effect in favor of the children attaining twenty-one.

Glasse, Q. C., referred to the case of *Berry* v. *Berry*, 7 Ch. D. 657, where there was a devise of lands to trustees, their heirs and assigns, to the use of A. for life, with remainder to the use of such child or children of A. as should attain twenty-one; and it was there held that the contingent remainder of the infant child of A. was equitable and did not fail by reason of the death of A. before the remainder vested. He then said he could not contest that until the child attained twenty-one the rents must go to the heir-at-law. That was decided in *In re Eddels' Trusts*, Law Rep. 11 Eq. 559.

Malins, V. C. As to the rents in the mean time, it cannot be disputed that they will go to the residue or to the heir-at-law.

The decree will therefore be that the part of the Saxthorpe estate subject to the mortgage passes under the limitations in the will; that the defendant Francis Jacob Astley is absolutely entitled to the part of the estate not subject to the mortgage; and that the defendant Francis Jacob Astley is entitled to the rents of the part of the estate subject to the mortgage until the same vests in possession.

As to the costs, I shall apply the principle I acted upon in *Scott* v. *Cumberland*, Law Rep. 18 Eq. 578. That seems to me a reasonable rule, and I must hold that the costs are to be apportioned between the specifically devised estate and the residuary estate.

IN RE LECHMERE AND LLOYD.

Chancery Division. 1881.

[*Reported* 18 *Ch. D.* 524.]

Adjourned Summons.

Elizabeth Williams, widow, being seised of a farm called Pistill, in the county of Radnor, by her will, made in 1846, shortly before her death, devised the same as follows: —

"I give and devise the said farm, lands, and hereditaments, unto and to the use of my granddaughter, Elizabeth Eckley, and her assigns during her life, without impeachment of waste; and from and after her decease I give and devise the same to such children of the said Elizabeth Eckley living at her death, and such issue then living of her children then deceased, as either before or after her decease shall, being a male or males, attain the age of twenty-one years, or, being a female or females, attain that age or marry, in fee simple, to take, if more than one, as tenants in common, according to the stocks, and not according to the number of individuals; and if there shall be no such children or issue," then over.

Elizabeth Eckley married Thomas Lechmere, and died in 1879, leaving seven children, of whom five had attained twenty-one at the time of

her death, and two, a son and a daughter, were infants, the daughter being also a spinster.

There was no issue of any deceased child.

The five adult children having entered into a contract for the sale of the farm, the question arose, upon an objection by the purchasers, whether these five children could make a good title to the entirety of the property; and whether all the seven children did not take vested interests in remainder as tenants in common, subject, as to the shares of the two infant children, to be divested in case of their dying under age.

The question was raised for the opinion of the court upon a summons taken out by the purchasers under the Vendor and Purchaser Act, 1874.

Snape, for the purchasers.

Grosvenor Woods, for the vendors.

JESSEL, M. R. I am sorry there is a report of such a case as *Brackenbury* v. *Gibbons*, 2 Ch. D. 417, because I am not aware of any other case in which the words we have here occur, and I cannot now say what I otherwise should have said had there been no such reported case. But, with all respect, I must say this, that the real point does not appear to have been taken by Vice-Chancellor Hall in *Brackenbury* v. *Gibbons*, for he fails to point out that the devise in that case, so far as it related to children who had not attained twenty-one when the particular estate determined, could really only take effect as an executory devise and not as a remainder at all. He seems to have relied upon *Holmes* v. *Prescott*, 10 Jur. N. S. 507; 12 W. R. 636, and *Rhodes* v. *Whitehead*, 2 Dr. & Sm. 532; but those were different cases altogether, for there the words "or after" the death, which were in *Brackenbury* v. *Gibbons*, and which we have here, did not occur. The Vice-Chancellor says that "Every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise." I agree, that is the rule; but I am at a loss to see how the devise in that case or this could take effect as a remainder. The rule is that a remainder must be capable of taking effect when the preceding estate determines. Now what is the gift here? It is this: [His Lordship then read the clause of the will above stated, and continued:] The rule being as stated by Vice-Chancellor Hall, that every gift which can take effect as a remainder absolutely excludes its being treated as an executory devise, how is it possible to construe such a gift as this — "to such children of the said Elizabeth Eckley living at her death as either before or after her decease shall, being a male or males, attain the age of twenty-one years, or, being a female or females, attain that age or marry, in fee simple" — as a gift that can take effect as a remainder as to those children who had not complied with the conditions of the will before the death of the tenant for life? It is impossible. It cannot take effect as a remainder as regards those children who attain twenty-one or marry after the death of the tenant for life; for the class to take under

the gift to children who attained twenty-one or married after the death could not possibly be ascertained during the lifetime of the tenant for life. Where the gift is to a class which can by no possibility be ascertained at the determination of the preceding estate of freehold, the class can only take on the footing of its being an executory devise. What ground is there for cutting down the devise and saying that only those who had attained twenty-one or married at the death of the tenant for life were to take?

If the devise be to A. for life, and after her death simply to a class of children who shall attain twenty-one or marry, I agree that those members of the class who have not attained twenty-one or married at the death of the tenant for life, though they may do so afterwards, cannot take, according to the rule in *Festing* v. *Allen*, 12 M. & W. 279; but here we have two distinct classes as the objects of the devise, the one being children living at the death of the tenant for life and attaining twenty-one or marrying *before* the death, and the other being children living at the death and attaining twenty-one or marrying after the death. There are two children who were living at the death of the tenant for life, but are at present under age: why should they not, upon their fulfilling the conditions of the will, participate in the testatrix's bounty equally with the other children who had fulfilled those conditions in the lifetime of the tenant for life? But to enable the second class to participate it is necessary to read the gift to them as an executory devise. The rule is that you construe every limitation, if you possibly can, as a remainder, rather than as an executory devise. It is a harsh rule: why should I extend it? Why should a gift which cannot possibly take effect as a remainder not take effect as an executory devise? I see no good reason why it should not.

The result is, in my opinion, that the devise in this case could not take effect as a remainder in respect of those children who survived the tenant for life but had not attained twenty-one at her death, and must, therefore, in order to let in those children, be construed as an executory devise. Consequently the five children who have attained twenty-one take vested interests liable to open to let in the two infant children on their fulfilling the conditions of the will; and I am therefore of opinion that the five children who attained twenty-one in the lifetime of the tenant for life cannot now make a good title to the entirety of the property.

BLANCHARD *v.* BLANCHARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1861.

[*Reported* 1 *Allen*, 223.]

PETITION FOR PARTITION, in which the petitioner claimed two undivided fifth parts of the estate described. At the trial in the Superior Court the following facts were proved.

William Blanchard, the former owner of the premises, died in 1840, leaving a widow and ten children; and his will, after a devise to his wife of all the income of all his real and personal property during her natural life, contained the following clause: "Thirdly, I give and bequeath to my beloved daughter Elizabeth Ford Blanchard, to my daughter Mary Jane Blanchard, to my daughter Anna Dawson Morrison Blanchard, to my son Henry Blanchard, and my son Samuel Orne Blanchard, all the property both real and personal that may be left at the death of my wife, to be divided equally between the last five named children. And provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors, except they should leave issue, in that case to go to said issue, provided the said issue be legitimate." The testator's widow died in 1857. The share of the daughter Mary Jane was conveyed to the petitioner by deed dated May 24, 1858. The petitioner, by deed dated July 25, 1842, conveyed to his mother all his right, title and interest in and to the real and personal estate of his late father.

Upon these facts, *Rockwell*, J., ruled that Henry Blanchard took no interest in the premises, under his father's will, which he could convey in the lifetime of his mother, and that his deed to his mother conveyed no interest therein, and that he was entitled to hold two fifths of the premises; and the jury found a verdict accordingly. The respondents alleged exceptions.

D. S. and *G. F. Richardson*, for the respondents.

E. Ripley, for the petitioner.

HOAR, J. The will of William Blanchard devised to his wife Elizabeth all the income of all his real and personal property during her natural life, and then devised as follows: —

"Thirdly, I give and bequeath to my beloved daughter Elizabeth Ford Blanchard, to my daughter Mary Jane Blanchard, to my daughter Anna Dawson Morrison Blanchard, to my son Henry Blanchard, and my son Samuel Orne Blanchard, all the property both real and personal that may be left at the death of my wife, to be divided equally between the five last named children. And provided, furthermore, that if any of the last five named children die before my wife, then the property to be equally divided between the survivors, except they should leave

issue, in that case to go to said issue, provided the said issue be legitimate." The testator had ten children, all of whom survived the wife.

The principal question presented by the exceptions is, whether Henry Blanchard, during the life of his mother, took a vested or contingent interest in the real estate of his father, included within the terms of the devise.

The language used is not wholly free from ambiguity; and the case certainly comes very near the dividing line between vested and contingent remainders. It does not seem probable that the testator, or the person by whom the will was drawn, had any very distinct notions or purposes upon the subject; and the expressions employed are such, that, among the great multiplicity and variety of adjudged cases, some may undoubtedly be found which would countenance either construction.

The gift of the income of real estate for life is a gift of a life estate in the land. *Blanchard* v. *Brooks*, 12 Pick. 63. The devise to the children was therefore of a remainder, vested or contingent, or an executory devise. It is a settled rule of law, that a gift shall not be deemed to be an executory devise if it is capable of taking effect as a remainder; and it is equally well settled, that no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested. *Blanchard* v. *Brooks*, *ubi supra*. 4 Kent Com. (6th ed), 202. *Shattuck* v. *Stedman*, 2 Pick. 468. *Doe* v. *Perryn*, 3 T. R. 484 and 489, note. We must then consider whether there is anything in the language of this devise which shows an intention to postpone its vesting until the death of the mother.

The first clause of the devise to the children is certainly sufficient, if it stood alone, to create a vested remainder in all the children. The words descriptive of the property, "all the property both real and personal that may be left at the death of my wife" are used inartificially, and in their ordinary sense would have no proper application to the devise which the testator was making. As he had only given to his wife the income of the estate for her life, all the property would be left at her death. But even if we may suppose that it was in the testator's mind that some part of the principal of the personal estate might be lost or consumed while his wife was enjoying the income of it, undoubtedly all the real estate must be left at her death. The words "that may be left" add nothing, therefore, to the meaning, unless they may be regarded as expressing the idea of devising all the estate remaining after the wife's estate for life. It would then stand as the ordinary case of a devise to the wife for life, remainder in fee to the five children at her death, to be equally divided between them. There would be by such a devise, according to all the authorities, a vested remainder created in them as tenants in common. It would vest at once in interest, though not in possession. There are no words of contingency, such as, "if they shall be living at her death," or "to such of them as shall be living," the usual and proper phrases to constitute

a condition precedent; but a direct gift of all the property left after the life estate previously carved out. The difficulty arises from the remaining sentence, which is a proviso containing a limitation over of the estate thus devised to the children respectively, upon the contingency of either of them dying before their mother, either with or without issue. Although this is in the form of a proviso, yet there are numerous cases in which a limitation thus expressed has been held to qualify in its inception the interest or estate before devised, and to make that contingent which would otherwise have been vested. And there is no doubt that if the effect of this clause is to limit the remainder to such of the children named as should survive their mother, then it is a contingent remainder. And this is the construction urged on behalf of the petitioner.

But if, on the other hand, it can be regarded as a devise in fee to the five children, subject to be divested upon a condition subsequent, with a limitation over on the happening of that condition, then the children named took a vested remainder in fee; the limitation over would have taken effect, if at all, only as an executory devise; and, as the contingency never happened, the fee became absolute.

Four cases only were cited by the counsel for the petitioner in favor of the former construction. *Doe* v. *Scudamore*, 2 Bos. & P. 289, was the case of a devise to G. L., the testator's heir-at-law for life, and from and after his death to C. B., her heirs and assigns forever, in case she should survive and outlive the said G. L., but not otherwise, and in case she should die in the lifetime of the said G. L., then to G. L., his heirs and assigns forever; and it was held that the devise to C. B. was of a contingent remainder. There the words of the gift made it expressly, and in the first instance, dependent upon the contingency.

In *Moore* v. *Lyons*, 25 Wend. 119, a devise to one for life, and from and after his death to three others or to the survivors or survivor of them, their or his heirs and assigns forever, was held, in the Court of Appeals, to give a vested interest to the remainder-men at the death of the testator, the words of survivorship being construed to refer to the death of the testator, and not to the death of the tenant for life. It had been conceded in the Supreme Court that, if the survivors at the death of the tenant for life had been intended, the remainder would have been contingent. Here, too, the survivorship directly qualified the gift, and it was not easy to regard it as a subsequent condition to an estate previously given. But Chancellor Walworth, in this case, was of opinion that the remainders would have been vested, even if the words of survivorship had been taken to refer to the death of the tenant for life; and states the rule to be, that "where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainder-man is *in esse* and

ascertained; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. Yet, if the estate is limited over to another in the event of the death of the first remainder-man before the determination of the particular estate, his vested estate will be subject to be divested by that event, and the interest of the substituted remainder-man, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder."

In *Hulburt* v. *Emerson*, 16 Mass. 241, the devise was to the testator's son John, his heirs, executors, and assigns, subject to the payment of a legacy; but in case John should leave no male issue, then one half to be equally among his children, and the other half equally among all the surviving children of the testator. This was held to give John an estate in tail male, with contingent remainders over; and that the surviving children were such as should be living whenever John died without male issue. No reasons are given by the court for the latter opinion, nor authorities cited to support it; and the heirs of the children who survived the testator, but did not survive John, were not parties to the suit.

The case of *Olney* v. *Hull*, 21 Pick. 311, is the remaining case, and perhaps the strongest in favor of the petitioner. The devise was to the testator's wife so long as she remained his widow; and should she marry or die, then to be equally divided among his surviving sons, with each son paying sixty dollars to his daughters, to be equally divided among them, as soon as each son might come in possession of the land. This court decided that no estate vested in the sons until the death of the widow; and in the opinion great stress is laid upon the provision that, "should the wife marry or die, the land *then* should be equally divided among the surviving sons," as indicating that the survivorship had reference to the death or marriage of the widow. But the difference between that case and the case at bar is this, that in the former the devise is made upon the contingency, while in the latter it is first made to the devisees by name, and the contingency appears only in a subsequent provision, which may consist as well with the previous vesting of the remainder.

And we are all of opinion that the case before us falls within another class of cases, which it more nearly resembles, and where the devise has been held to create a vested interest, determinable upon the happening of the contingency.

Such a case was *Bromfield* v. *Crowder*, 1 New Rep. 313, where the testator devised to A. for life, and after her death to B. for life, and at the decease of A. and B., or the survivor, gave all his real estate to C., if he should live to attain the age of twenty-one; but in case he should die before that age, and D. should survive him, in that case to D. if he should live to attain twenty-one, but not otherwise; but in case both C. and D. should die before either of them should attain twenty-one,

then to E. in fee. It was held by all the judges of the Common Pleas, that C. took a vested estate in fee simple, determinable upon the contingency of his dying under the age of twenty-one years, the intention of the testator being apparent to make a condition subsequent, and not a condition precedent, notwithstanding the use of the word "if." And they relied upon *Edwards* v. *Hammond*, 3 Lev. 132, which was the case of a copyholder who "surrendered to the use of himself for life, and after to the use of his eldest son and his heirs, if he live to the age of twenty-one years; provided, and upon condition, that if he die before twenty-one, that then it shall remain to the surrenderor and his heirs;" and it was held that, notwithstanding the word "if" in the first clause, the whole showed an intention to create a condition subsequent. *Bromfield* v. *Crowder* was afterwards affirmed in the House of Lords.

In *Doe* v. *Moore*, 14 East, 601, a devise of real estate in fee to J. M. when he attains the age of twenty-one; but in case he dies before twenty-one, then to his brother when he attains twenty-one; with like remainders over: was held to give to J. M. an immediate vested interest, and that the dying under twenty-one was a condition subsequent on which the estate was to be divested. Lord Ellenborough cited *Mansfield* v. *Dugard*, 1 Eq. Cas. Ab. 195; *Edwards* v. *Hammond*; *Bromfield* v. *Crowder*; and *Goodtitle* v. *Whitby*, 1 Burr. 228; and said that "these authorities were attempted to be distinguished, on the ground that they were cases of a remainder and not of an immediate devise; but that forms no substantial ground of distinction: the estate vests immediately, whether any particular interest is carved out of it to take effect in possession in the mean time or not."

Smither v. *Willock*, 9 Ves. 233, was the case of a bequest of personal estate to the testator's wife for life, and from and after her death to be divided between his brothers and sisters in equal shares; but, in the case of the death of any of them in the lifetime of the wife, the shares of him or her so dying to be divided between all and every his, her, or their children. Sir William Grant decided that the shares vested in the brothers and sisters, subject only to be divested in the event of death in the life of the testator's widow, leaving children.

But a case more nearly resembling the case at bar is *Doe* v. *Nowell*, 1 M. & S. 327. There was a devise to J. R. for life, and on his decease to and among his children equally at the age of twenty-one, and their heirs, as tenants in common; but if only one child should live to attain such age, to such child and his or her heirs, at his or her age of twenty-one; and in case J. R. should die without issue, or such issue should die before twenty-one, then over. It was held that the children of J. R. took vested remainders; and Lord Ellenborough said that the case of *Bromfield* v. *Crowder* was very fully considered, and was a conclusive authority.

In *Ray* v. *Enslin*, 2 Mass. 554, the devise was to the wife for life, and after her decease to the testator's daughter and her heirs forever. "But in case my daughter should happen to die before she come to

age, or have lawful heir of her body begotten," then one third to his sister and two thirds to his wife, and their heirs forever. It was held that the daughter took a vested estate in fee simple defeasible upon a contingency reasonably determinable. See also *Richardson* v. *Noyes*, 2 Mass. 56.

These cases, with many others depending on a similar principle, seem to us sufficient to show that the devise to Henry Blanchard was of a vested remainder, defeasible on a condition subsequent, which he could convey by deed in the lifetime of his mother. This would be equally true whether his remainder was in fee simple or in tail. Were the other construction to prevail, it would follow that, if the tenant for life should have forfeited her estate by waste, the whole estate would have gone to the heirs at law, which is obviously inconsistent with the whole intention of the testator. At least such would have been the effect of the forfeiture at common law, though in this Commonwealth such a consequence has been guarded against by Statute. Rev. Sts. *c.* 59, § 7.

The decision of this question renders the other point, respecting the deed of Henry Blanchard to his mother, of no importance.

Exceptions sustained.[1]

[1] See Gray, Perpetuities, §§ 104–108.

On the reversion of the fee before a contingent remainder vests, see authorities cited Id. § 11, note.

CHAPTER III.

RULE IN SHELLEY'S CASE.

NOTE. — The Rule in Shelley's Case is said to be first mentioned in *Abel's Case*, 18 Edw. II. 577 (1324), which will be found translated 7 M. & G. 941, *note*. Cf. also *Provost of Beverly's Case*, 40 Edw. III. 9 (1366), and *Shelley's Case*, 1 Co. 93 b (1581), from which the rule has its name. See *Archer's Case*, 1 Co. 66 b (1597) p. 46 *ante*, followed in *Willis* v. *Hiscox*, 4 Myl. & Cr. 197 (1839), and *Chamberlayne* v. *Chamberlayne*, 6 E. & B. 625 1856).

"The rule assumes and founds itself upon two pre-existing circumstances, — a freehold in the ancestor, and a remainder to the heirs. The absence of either of these ingredients repels the application of the rule; their concurrence irresistibly invites it. When the rule supposes the second limitation to be a REMAINDER, it plainly excludes, — 1, the case of limitations differing in quality, the one being legal and the other equitable; 2, the case of limitations arising under distinct assurances; and, 3, the case of an *executory* limitation, by way of devise or use; and, consequently, upon *principle*, the case of a limitation arising under an appointment of the use; but *authority* seems to have established an anomalous exception in regard to appointments. Again, as the second limitation must be a remainder to the HEIRS, it follows, that, with limitations to *sons*, *children*, or other objects, to take, either as individuals or as a class, under what is termed a *descriptio personæ*, as distinguished from a limitation embracing the line of inheritable succession, the rule has no concern whatever. In order to find whether the second limitation is a *remainder* to the *heirs* or not, we must resort to the general rules and principles of law. The rule being a maxim of legal policy, conversant with *things* and not with *words*, applies whenever judicial exposition determines that *heirs* are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term *heirs*. Thus, even the word *children*, aided by the context, or the word *issue*, uncontrolled by the context, may have all the force of the word *heirs*, and then the rule applies; while the word *heirs*, restrained by the context, may have only the force of the word *children*, and then the rule is utterly irrelevant. These are preliminary questions, purely of CONSTRUCTION, to be considered without any reference to the rule, and to be solved by, exclusively, the ordinary process of interpretation. *This* point, kept steadily in view, would have prevented infinite confusion.

"The operation of the rule is twofold: first, it denies to the remainder the effect of a gift to the *heirs;* secondly, it attributes to the remainder the effect of a gift to the *ancestor* himself. It is, therefore, clear that the rule not only defeats the intention, *but substitutes a legal intendment directly opposed to the obvious design of the limitation.* A rule which *so* operates cannot be a rule of *construction*. As a consequence of transferring the benefit of the remainder from the heirs, who are unascertained, to the ancestor, who is ascertained, the inheritance, limited in contingency to the heirs, *may* become *vested* in the ancestor; and, as another consequence of the same process, the ancestor's estate of freehold *may* merge in the inheritance. Thus — 1. If land be limited to A. for life, remainder to his heirs or to the heirs of his body, the primary effect will be to give him an estate of freehold (liable, of course, to merger), with, by force of the rule, a remainder *immediate* and *vested*, to himself in fee or in tail (just as if the limitations were to him for life, remainder to *him and* his heirs, or to *him and* the heirs of his body); and the final result, under the law of merger, will be, by the absorption of the particular freehold in the vested inheritance, to give him an estate in fee tail or an estate in fee simple in possession. But — 2. If land be limited to A. for

life, remainder, *if A. shall survive B.*, to his (A.'s) heirs or to the heirs of his body, then, as the remainder is contingent, because made to depend on A.'s surviving B., the ancestor (A.) will take, under the rule, not a vested, but a *contingent* inheritance; (just as if the limitations were to him for life, remainder, if &c., to *him and* his heirs, or to *him and* the heirs of his body); the rule changing the *object*, but not the *quality* of the remainder. Here, as the inheritance cannot vest, the particular estate of freehold will not merge, but A. will remain tenant for life, with an immediate *contingent* remainder to himself in tail or in fee. This remainder, in the event of his surviving B., will *vest* in him (A.); the estate of freehold will *then* merge, and he will thus have, as in the previous example, a fee tail or fee simple in possession. So — 3. If land be limited to A. for life, remainder to B. for life or in tail, remainder to the heir or heirs of the body of A., then, by reason of the interposition of the estate for life or estate tail of B., the ancestor (A.) has, under the rule, not an immediate but only a *mediate* inheritance (just as if the limitations were to him for life, remainder to B. for life or in tail, remainder to *him* (A.) *and* his heirs, or to *him and* the heirs of his body), the rule changing the *object*, but not the *position*, of the remainder. A., therefore, will be tenant for life, with a mesne *vested* remainder to himself in tail or in fee, in which remainder, if B.'s interposed estate should determine in A.'s lifetime, A.'s life estate will merge, and he will then have, as in the first example, a fee tail or fee simple in possession.

"The obvious deduction from these examples is, that in no case does the *rule* disturb the particular estate of freehold in the ancestor, which estate is left to the uncontrolled operation of ordinary principles, merging, or not merging, according as the remainder, transferred by the rule from the heirs to the ancestor, is absolute or conditional, proximate or remote. The estate of freehold is a *circumstance* without which the rule is dormant; but the rule, when called into action, exerts its force *on the remainder alone*. Why *that* circumstance was selected, we can only conjecture. It is affirmed, indeed, that a limitation to A. for *life*, with *remainder* to his heirs, is in truth the same thing as a limitation to *A.* AND *his heirs*. In the simple case thus put, the EFFECT, under the *rule*, aided by the doctrine of *merger*, is the same, but surely the IMPORT is not the same. And how unsatisfactory does this reasoning appear, when it is recollected that the rule equally applies where the gift is to A. for life, remainder (interposed) to B. for life, remainder to the heirs of A.; or to A. *pur auter vie*, remainder to the heirs of A.; or, to A. *durante viduitate*, remainder to the heirs of A.; or to A. in tail, remainder to the heirs of A. &c., — cases which need only be mentioned in order to destroy the theory that would form a fee by the *union* of the two limitations. It is an error, and the fruitful parent of errors, to affirm that the limitations unite or coalesce under the *rule*, which has discharged *its* office by simply substituting the ancestor for the heirs in the second limitation.

"When the ordinary rules of construction have ascertained the co-existence of a freehold in the ancestor with a remainder to the heirs, the simplest and surest method of applying the rule is to read the second limitation as a limitation to *the ancestor himself and* his heirs. This gives at once, and in every possible case, the true result. The effect, universally and constantly, will be the same as if the remainder had been expressly and intentionally limited to the ancestor and his heirs: — reading the words 'and his heirs,' not (according to the notion referred to at the close of the preceding paragraph), as words of limitation of the estate of freehold before expressly *limited* to him, but as words of limitation of the estate in remainder *attributed to him by the rule*." — 1 *Hayes, Conv.* (5th ed.), 542–546.

Co. Lit. 319 b. Where the ancestor taketh an estate of freehold,[1] and after a remainder is limited to his right heirs, the fee simple vesteth in himself, as well as if it had been limited to him and his

[1] Although it be determinable, *e. g.* by marriage. *Curtis* v. *Price*, 12 Ves. 89 (1805). — ED.

heirs; for his right heirs are in this case words of limitation of estate, and not of purchase. Otherwise it is where the ancestor taketh but an estate for years: as, if a lease for years be made to A., the remainder to B. in tail, the remainder to the right heirs of A., there the remainder vesteth not in A., but the right heirs shall take by purchase if A. die during the estate tail: for as the ancestor and the heir are *correlativa* of inheritances, so are the testator and executor, or the intestate and administrator of chattels. And so it is if A. make a feoffment in fee to the use of B. for life, and after to the use of C. for life or in tail, and after to the use of the right heirs of B. B. hath the fee simple in him as well when it is by way of limitation of use, as when it is by act executed.

MOOR *v.* PARKER.

King's Bench. 1694.

[*Reported* 4 *Mod.* 316.]

Assumpsit upon a wager, being a signed issue directed by the House of Peers. The case upon a special verdict found was thus: —

George Chute the father being seised of the lands in question, made a settlement thereof to George his son for life, remainder to his first, &c. son in tail male, reversion in fee to George the father, who in June, 1683, made his will as follows: "As touching my lands and tenements, &c., my will is, that if my son's wife die during the life of her husband without issue male, that then he shall have power to make a jointure to any other wife, and *for want of issue male* of his said son, then the lands shall be and remain to his son by any other wife, and his granddaughter shall have four thousand pounds, *and in case of failure of issue male* by his son George, then all his lands shall go to his grandchildren and their heirs, share and share alike." George the father died; his son survived and suffered a common recovery, and died without issue male.

The question was, Whether those who claimed under the recovery, or the grandchildren of the testator, had the better title; that is, whether George the son had only an *estate for life* or an *estate in tail?*

Levinz, Serjeant, argued that the son had an estate tail.

Sir Bartholomew Shower, contra.

Curia. It will be impossible to make this an estate tail by tacking the estate by the will, to the estate for life in the settlement, on purpose to support the contingent remainder, because the settlement and will are two distinct conveyances.

And therefore judgment was given that this was not an estate tail.

LANGLY *v.* BALDWIN.

COMMON PLEAS AND CHANCERY. 1707.

[*Reported* 1 *Eq. Cas. Ab.* 185, *pl.* 29.]

A. DEVISED certain lands to his eldest son for life, without impeachment of waste, remainder to J. S. his grandchild, for life, without impeachment of waste, with a power to him to limit a jointure of the same land to any woman he should marry for her life; and after his death he devised the lands to the first son of J. S. the grandchild in tail, and so to the sixth son, and then devised, that if J. S., the grandchild, should die without issue male, the land should remain to J. B.; and the question was, what estate J. S. took by the will; and it was certified by the Court of C. P. that he took an estate tail; which was decreed accordingly.

BAILE *v.* COLEMAN.

CHANCERY. 1711.

[*Reported* 2 *Vern.* 670.]

WILLIAM STOWELL by will devised lands to trustees and their heirs, for payment of debts and legacies; and after debts and legacies paid, willed that one fourth part should be and remain in trust for Elizabeth Baile, for and during the term of her natural life, with power of leasing for ninety-nine years, determinable on *one*, *two*, or *three* lives; and from and after her decease, in trust for her son Christopher Baile, for and during the term of his natural life, with like power of leasing; and after his decease, in trust for the heirs males of the body of the said Christopher, lawfully to be begotten.

Lord Chancellor Cowper decreed the trustees to convey only an estate for life to Christopher Baile, and to his first and other sons in tail male.

But upon a re-hearing, the LORD KEEPER [SIR SIMON HARCOURT] reversed that decree, and decreed an estate-tail to be conveyed to Christopher; viz., to him and the heirs male of his body.

Although he admitted that, upon articles of marriage founded on the agreement of the parties, the husband in such case might be made only tenant for life; but in a will you must take words as you find them.[1]

[1] See *Garth* v. *Baldwin*, 2 Ves. Sr. 646, 657, 658 (1755).

PAPILLON *v.* VOICE.

CHANCERY. 1728.

[*Reported* 2 *P. Wms.* 471.]

A. DEVISED £10,000 to trustees to be laid out in a purchase of lands, and to be settled on B. for life, without impeachment of waste, and from and after the determination of that estate to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B. with remainders over, with a power to B. to make a jointure; and by the same will A. devised lands to B. for his life without waste, and from and after the determination of that estate, to trustees and their heirs during the life of B. to preserve contingent remainders, remainder to the heirs of the body of B. remainders over, and died leaving C. executor.

B. brings his bill against the executor to have the £10,000 laid out in land, and settled in the same manner, and with the like limitations as the land was devised by the will, by which it was insisted a plain estate-tail vested in B., and also that C. the executor should deliver to B. the writings relating to the land devised, he being entitled to the inheritance. [SIR JOSEPH JEKYLL, M. R., held that under the devise the heirs of B.'s body took as purchasers, and that as to the money to be laid out in lands, the lands should be settled so that B. should be tenant for life only.]

But the cause coming afterwards upon an appeal before LORD CHANCELLOR KING, his Lordship declared, as to that part of the case where the lands were devised to B. for life, though said to be without waste, with remainder to trustees to support contingent remainders, remainder to the heirs of the body of B., this remainder was within the general rule, and must operate as words of limitation, and consequently create a vested estate-tail in B.,[1] and that the breaking into this rule would occasion the utmost uncertainty; wherefore the writings and title-deeds of this estate ought to be delivered to B. the plaintiff: But,

As to the other point LORD CHANCELLOR declared the court had a power over the money directed by the will to be invested in land; that the diversity was, where the will passes a legal estate, and where it is only executory, and the party must come to this court, in order to have the benefit of the will; that in the latter case the intention should take place, and not the rules of law; so that as to the lands to be purchased they should not be limited to B. for life, with power, &c., remainder to

[1] Though this was LORD CHANCELLOR'S opinion, yet the question as to the land devised was given up, the plaintiff having brought a supplemental bill, whereby it appeared that by his father's marriage-articles he was entitled to an estate-tail.

the heirs of his body, but to B. for life with power, &c., remainder to trustees during his life to preserve contingent remainders, remainder to his first and every other son in tail male, remainder over, &c.[1]

ROE *v.* GREW.

COMMON PLEAS. 1767.

[*Reported* 2 *Wils.* 322.]

EJECTMENT for lands in Middlesex tried before *Lord Camden* at the sitting after Easter Term last; verdict for the plaintiff upon the following case, subject to the opinion of the court. The case states, that Daniel Dodson, being seised in fee of the lands in question, by his will devised the same in these words, viz. "I give, devise and bequeath unto my nephew George Grew, all my lands (naming and describing them particularly), to hold the same with their appurtenances unto him the said George Grew, for and during the term of his natural life, and from and after his decease to the use of the *issue* male of his body lawfully to be begotten, and the heirs male of the body of such issue male; and for want of such issue male, then I give all and every the aforesaid premises unto my nephew George Dodson, his heirs and assigns forever."

That in the devise to George Grew the words "heirs male of his body" were originally written, but that the word *heirs* was scratched out, and the word *issue* inserted in its stead, in the same hand with the body of the will, but in different ink.

That George Dodson, the devisee in remainder in the will, is the lessor of the plaintiff.

That the testator devised other lands to the lessor of the plaintiff in fee.

That George Grew and the lessor of the plaintiff were the testator's nephews, and he devised the residue of his estates both real and personal, equally between his said two nephews.

That George Grew had no child at the time of making the will; that he entered on the premises in question, and suffered a common recovery thereof, and died without issue male.

The question upon this case is, whether George Grew took an estate-tail, or for life only, under the said will?

This case was argued by *Serjeant Leigh* for the plaintiff, and *Serjeant Burland* for the defendant; after time taken to consider, judgment was given for the defendant by the whole court the 28th of January in this term, that George Grew took an estate-tail, and that the lessor of the plaintiff was barred by the recovery.

[1] See *Coulson* v. *Coulson*, 2 Stra. 1125 (1740).

Lord Chief Justice Wilmot. The testator had no issue at the time of the will; his intention is to be followed, provided it does not clash with the rules of law; the Statute of Wills gives a man power to devise his lands, but he cannot by his will create a perpetuity, nor restrain tenant in tail from suffering a recovery, &c., &c., these being contrary to the rules of law. The intention of the testator clearly was to give George Grew an estate for life only, but his intention also clearly was, that all the sons of George Grew should take in succession; both these intentions cannot take place, for if the devisee George Grew took only an estate for life, his sons could never have taken, and although it eventually happened that he had no sons, yet we must consider this case as if he had had issue; therefore the court must put themselves in the place of the testator, and determine as he would have done, if he had been told that both of his intentions in the will, by the rules of law, could not take place, and had been asked which of them he desired should take effect and stand, as both could not, he certainly would have answered, "that so long as George Grew had any issue male, that the premises should not go to the lessor of the plaintiff;" and if we balance the two intentions, the weightiest is, that all the sons of George Grew should take in succession, and therefore to enable them to take, George Grew must be adjudged to have been tenant in tail, for the testator's great intention most clearly was, that the lands should never go over to the lessor of the plaintiff in remainder, but upon a failure of issue of George Grew.

The word *issue* in a will, is either a word of purchase or of limitation, as will best effectuate the intention of the testator; it is a plural word, and takes *in* all the sons of George Grew, and the words "*Issue male of his body and the heirs male of the body of such issue*," mean only that they were not all to take at a time, but in succession, as if he had said *to his first and every other son, &c.* As to the scratching out the word *heirs*, I lay no stress at all upon that, because the testator's chief and predominant intent was clearly that the lands should go in succession to all the sons of George Grew.

Cases in the books upon wills have no great weight with me unless they are exactly in the very point, and there has not one been cited in everything like this; the intention is the great thing which governs me, which is that George Grew's sons should take in succession, which they could not do if he was only tenant for life; and therefore I am of opinion he was tenant in tail, and judgment must be for the defendant.

Clive, Justice. The word *issue* is one of the most vexed words in the books: sometimes it is *nomen singulare*, sometimes *plural*, sometimes a word of *limitation*, sometimes of *purchase*, but it must always be construed according to the intent of the will or deed wherein it is used; if one grants to a man and his issue (who has issue at the time of the grant), the issue shall take jointly with him. In the present case the great intention is to give in succession to all the sons of George Grew,

which cannot be without construing it an estate-tail in him; I think too great regard has been paid to the superadded words "*Heirs male of the body of such issue*," and am of the same opinion with my Lord Chief Justice.

Bathurst, Justice. It is a rule, that where an ancestor takes an estate of freehold, if the word *issue* in a will comes after, it is a word of limitation; where there appears a particular intent, and a general intent, the general must take place; the great view here was, that the land should go over to Dodson so long as Grew had issue, but that general intent cannot take effect unless Grew be tenant in tail; and am of opinion he was, and agree with my Lord and Brother.

Gould, Justice. I am of the same opinion; the word *issue* is used in the Statute *de Donis* promiscuously with the word *heirs*. The term *issue* comprehends the whole generation, as well as the word *heirs;* and in my judgment the word *issue* is more properly, in its natural signification, a word of *limitation* than of *purchase*.

Judgment for the defendant.[1]

PERRIN *v.* BLAKE.

King's Bench. 1769.

[*Reported* 1 *W. Bl.* 672.]

Action of trespass: special verdict.

William Williams, by his last will, after giving portions to his three daughters, disposes of his "temporal estate in manner following: It is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his life: and, *to that intent*, I give, devise, and bequeath, all the rest and residue of my estate to my son John Williams, and any son my wife may be ensient of at my death, for and during the term of their natural lives; the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said sons, John Williams and the said infant; the remainder to the heirs of the bodies of my said sons, John Williams and the said infant lawfully begotten or to be begotten: the remainder to my daughters for and during the term of their natural lives, equally to be divided between them; the remainder to my said brother-in-law Isaac Gale during the natural lives of my said daughters respectively; the remainder to the heirs of the bodies of my said daughters equally to be divided between them. And I do declare it to be my will and pleasure, that the share or part of any of my said daughters, that shall happen to die, shall immediately vest in the heirs of her body in manner aforesaid." William Williams died 4th February, 1723, leaving issue

[1] See *Doe* d. *Candler* v. *Smith*, 7 T. R. 531 (1798); *Doe* d. *Cock* v. *Cooper*, 1 East 229 (1801).

one son, named John Williams, and three daughters, Bonneta, Hannah, and Anne, and his wife not ensient. John Williams suffered a recovery, and declared the uses to himself and his heirs.

N. B. This was a case from Jamaica, and in fact, instead of a recovery, the supposed estate tail of John Williams was endeavored to be barred, by a lease and release enrolled, according to the local law of that country. It came on before a committee of the Privy Council, who directed a case to be stated for the opinion of the Court of King's Bench, who refused to receive it in that shape. And therefore, a feigned action was brought and the case above stated was by consent reserved at the trial.

It was argued in this [Easter] and Trinity Terms; the question being merely this, Whether John Williams took by this will an estate for life or in tail. And in Michaelmas Term following it was adjudged by Lord Mansfield, C. J., Aston and Willes, JJ., that he took only an estate for life; Yates, J., *contra*, that he took an estate tail. But I was not present when the judgment of the court was delivered.[1]

ROE d. THONG *v.* BEDFORD.

King's Bench. 1815.

[*Reported* 4 *M. & S.* 362.]

Upon a case reserved at the trial of this ejectment, at Huntingdon, the facts, as far as concerns the point determined by the court, were these: —

Walter Thong, being seised in fee, on the 13th of August, 1768, devised the premises in question to his wife for life, subject to the payment of an annuity of £10 to J. H. during the life of his wife, with which he charged the premises; and after the determination of that estate, to trustees to preserve contingent remainders; "and from and immediately after the decease of my wife, I devise the said messuages, &c. to my daughter Elizabeth, the wife of J. Bedford (the defendant),

[1] This case did not come before the court on a special verdict, but upon a demurrer to the replication in a feigned action of trespass. See 1 Doug. 343 note. The opinions of the judges are given in 1 Harg. Coll. Jur. 283, 296.

A writ of error was brought upon this judgment in the Exchequer Chamber, and was there argued several times, for the last time in May, 1771. On January 29, 1772, the judges delivered their opinions. Parker, C. B., Adams, B., Gould, J., Perrott, B., Blackstone and Nares, JJ., were for reversal. De Grey, C. J., and Smyth, B., were for affirmance. Mr. Justice Blackstone's opinion will be found in Harg. Law Tracts, 487.

A writ of error was brought to carry the case to the House of Lords, where it was kept pending for several years, but in 1777 it was compromised, without a hearing.

For the controversy to which this case gave rise, see Fearne, C. R. 155–173; Fearne's Letter to Lord Mansfield appended to the First Volume of the Fourth Edition of the Treatise on Contingent Remainders; 3 Campbell, Chief Justices (3d ed.) 305–312.

for life, subject to the payment of the said annuity, with remainder in like manner to trustees to preserve contingent remainders; and from and immediately after the decease of my said daughter, I devise all and singular the said messuages, &c. to the heirs of her body lawfully begotten; and for want of such issue, then I devise the same to my grandson O. W. Thong and his heirs and assigns forever; it being my will and meaning that after the decease of my wife, my daughter should have only an estate for life in the said premises, and that after the decease of my wife and daughter, the said premises should go to and vest in the heirs of the body of my daughter; and that for want or in default of such issue the same should absolutely go and vest in O. W. Thong and his heirs, and that my daughter should not have any power to defeat my intent and meaning in this respect." And he gave power to the trustees and their heirs, and directed them, from time to time and at all times thereafter, to do all acts necessary for fulfilling such his intent and meaning, or the more effectually settling the said premises agreeably thereto, and the prevention of anything being done to defeat the same, &c. The testator died, leaving his widow, and Elizabeth, his only child, then married to the defendant. Afterwards the widow died, and the defendant and his wife Elizabeth suffered a recovery of the premises to such uses as Elizabeth should by deed or will appoint; and she, by her will, appointed the premises to the defendant in fee, and died, never having had issue.

And the question was, whether under this devise Elizabeth, the daughter, had an estate for life, or in tail.

Storks, for the plaintiff.

Lord Ellenborough, C. J. If we should be of opinion that Elizabeth the daughter took an estate tail, there is an end of this case. And it appears to me that under this devise an estate tail in remainder vested in her. The rule is, I think, well and shortly laid down by Lord Thurlow in *Jones* v. *Morgan*, 1 Br. Ch. Cas. 219, who said that "By all the cases where the estate is so given, that after the limitation to the first taker it is to go to every person who can claim as heir to the first taker, the word heirs must be a word of limitation." It seems to me, following this construction, that this must be an estate tail in the daughter, in order to effectuate the intention of the testator, which was, that all her issue should take. And this puts an end to the case without going into any other point.

Le Blanc, J. The plain intention of the testator was to give his daughter an estate tail; for it was not to go over until there was a failure of her issue, and he has not superadded words of limitation to the heirs of her body, to show that he meant the children of his daughter only. At the same time he intended to prevent her barring the issue; but this he cannot do.

Bayley, J. I am of the same opinion. In *Colson* v. *Colson*, 2 Atk. 246, it was determined that an estate tail vested in the first taker, notwithstanding it was devised to him for life, with remainder to trustees to

support contingent remainders. I have always understood the rule to be, that wherever an estate for life is given to the first taker, and afterwards to any branch of his heirs as a class, so that the whole line of heirs to the first taker, who answer to the description in the will, should succeed him as such, there the first taker cannot have an estate for life, because all heirs claiming as heirs must take by descent; and therefore the words "heirs of the body" do not operate as a *designatio personarum*, but are words of limitation. The words *heirs of the body* are properly words of limitation, and not words of purchase.

DAMPIER, J. It seems clear, by the limitation over for want of issue of his daughter, that the testator used *heirs of the body* as words of limitation. It has already been determined that this is a devise of a *legal* estate, *Thong* v. *Bedford*, 1 Br. Ch. Cas. 313, and Lord Hardwicke in *Bagshaw* v. *Spencer*, 1 Ves. 142, when he took a difference betwixt a *trust in equity* and a *legal* estate, agreed that upon a devise of a mere *legal* estate, the words must be taken as they stood, according to the strict legal determination.

Judgment for the defendant.

Frere, Serjt., was for the defendant.

JESSON *v.* WRIGHT.

HOUSE OF LORDS. 1820.

[*Reported* 2 *Bligh*, 1.]

EJECTMENT[1] in the King's Bench for land in Stafford. At the trial in March, 1815, before *Dallas*, J., the jury found a special verdict in substance as follows: In 1773 Ezekiel Persehouse died and devised to "William, one of the sons of my sister Ann Wright, before marriage, all that messuage," &c., being the land in question, "to hold the same premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair; and from and after his decease I give and devise all the said dwelling-houses," &c., "unto the heirs of the body of the said William, son of my said sister Ann Wright, lawfully issuing, in such shares and proportions as he the said William shall" by deed or will "give, direct, limit or appoint, and for want of such gift, direction, limitation or appointment, then to the heirs of the body of the said William, son of my said sister, Ann Wright, lawfully issuing, share and share alike, as tenants in common, and if but one child, the whole to such only child, and for want of such issue," then over.

William Wright married Mary Jones, by whom he had issue, his eldest son Edward, and several other children. In 1800 he, his wife and his son Edward, suffered a recovery. The lessors of the plaintiff were the

[1] The statement of the case is abreviated from that in the report.

heirs of Ezekiel Persehouse, and the younger children of William Wright.

The Court of King's Bench gave judgment for the plaintiff, and the defendants brought a writ of error in the House of Lords. The principal error assigned was, that the court below, by their judgment, had decided that "William Wright took only a life-estate under the will of, &c., with remainder to his children for life; and that the recovery suffered by William Wright, Mary his wife, and Edward Wright, was a forfeiture of their estate. Whereas the plaintiffs in error contended, that the testator intended to embrace all the issue of William Wright, which intention could only be effected by giving William Wright an estate tail, for which purpose the words of the will are fully sufficient."

Mr. Jervis and *Mr. Sugden*, for the plaintiffs in error.

W. E. Taunton and *C. Puller*, for the defendants in error.

The Law Chancellor. [Lord Eldon.] The question to be decided in this case is expressed in the words to be found in the errors assigned, the principal of which is, that the court, by their judgment, have decided "that the said William Wright took only a life estate under the said will of the said E. Persehouse, with remainder to his children for life; and that the recovery suffered by the said William Wright, and Mary his wife, and Edward Wright, was a forfeiture of their estate. Whereas, the said R. Jesson, J. Hately, W. Whitehouse, J. Watton, E. Dangerfield the elder, and T. Dangerfield, allege for error, that the testator intended to embrace all the issue of the said William Wright, which intention can only be effected by giving to the said William Wright an estate tail, and the words of the will are fully sufficient for that purpose." I will not trouble the House by going through all the cases in which the rule has been established; that where there is a particular and a general intent, the particular is to be sacrificed to the general intent. The opinion which I have formed concurs with most, though not with every one, of those cases. A great many certainly, and almost all of them coincide and concur in the establishment of that rule. Whether it was wise originally to adopt such a rule might be a matter of discussion; but it has been acted upon so long that it would be to remove the landmarks of the law, if we should dispute the propriety of applying it to all cases to which it is applicable. There is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate, according to the general and paramount intent to destroy the interest both under the general and the particular intent. However, it is definitively settled as a rule of law that where there is a particular, and a general or paramount intent, the latter shall prevail, and courts are bound to give effect to the paramount intent.

This is a short will. The decision in the court below has proceeded upon the notion, that no such paramount intent is to be found in this

will. Here, I must remark, how important it is, that, in preparing cases to be laid before the House, great care should be taken not to insert in them more than the words of the record. In page 3 of the printed case delivered on behalf of the plaintiffs in error, are to be found the words "appointee in tail general of the lands, &c., thereinafter granted and released of the second part." These words are not to be found in the record. I mention the fact, because, if this is to be quoted as an authority in similar cases, it may mislead those who read and have to decide upon it, if not noticed. According to the words of the will, it is absurd to suppose that the testator could have such intention as the rules of law compel us to ascribe to his will. "I give and devise unto William, one of the sons of my sister Ann Wright before marriage, all that messuage, &c., to hold the said premises unto the said William, son of my said sister Ann Wright, for and during the term of his natural life, he keeping all the said dwelling-houses and buildings in tenantable repair." If we stop here it is clear that the testator intended to give to William an interest for life only. The next words are, "and from and after his decease, I give and devise all the said dwelling-houses, &c., unto the *heirs of the body* of the said William, son of my said sister Ann Wright, lawfully issuing." If we stop there, notwithstanding he had before given an estate expressly to William for his natural life only, it is clear that, by the effect of these following words, he would be tenant in tail; and, in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it as clear as the general intent here expressed. The words "heirs of the body" will indeed yield, to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible, and unequivocal. The will then proceeds, "in such shares and proportions as he, the said William, shall by deed, &c., appoint." This part of the will makes it necessary again to advert to the extraneous words inserted in the case of the plaintiffs in error, and to caution those who prepare them. "Heirs of the body" mean one person at any given time; but they comprehend all the posterity of the donee in succession: William, therefore, could not strictly and technically appoint to heirs of the body. This is the power, and then come the words of limitation over in default of execution of the power; "and for want of such gift, direction, limitation, or appointment, then to *the heirs of the body* of the said William, son of my said sister Ann Wright, lawfully issuing, share and share alike as tenants in common."

It has been powerfully argued (and no case was ever better argued at this bar) that the appointment could not be to all the heirs of the body in succession forever, and, therefore, that it must mean a person, or class of persons, to take by purchase; that the descendants in all time to come could not be tenants in common; that "heirs of the body," in this part of the will, must mean the same class of persons as

the "heirs of the body," among whom he had before given the power to appoint; and, inasmuch as you here find a child described as an heir of the body, you are therefore to conclude, that heirs of the body mean nothing but children. Against such a construction many difficulties have been raised on the other side, as, for instance, how the children should take, in certain events, as where some of the children should be born and die before others come into being. How is this limitation, in default of appointment in such case, to be construed and applied? The defendants in error contend, upon the construction of the words in the power, and the limitation in default of appointment, that the words "heirs of the body" mean some particular class of persons within the general description of heirs of the body; and it was further strongly insisted that it must be children, because, in the concluding clause, of the limitation in default of appointment, the whole estate is given to one *child*, if there should be only one. Their construction is, that the testator gives the estate to William for life, and to the children as tenants in common for life. How they could so take, in many of the cases put on the other side, it is difficult to settle. Children are included undoubtedly in heirs of the body; and if there had been but one child, he would have been heir of the body and his issue would have been heirs of the body; but, because children are included in the words heirs of the body, it does not follow that heirs of the body must mean only children, where you can find upon the will a more general intent comprehending more objects. Then the words, "*for want of* such *issue*," which follow, it is said, mean for want of children; because the word such is referential, and the word child occurs in the limitation immediately preceding. On the other hand, it is argued, that heirs of the body being the general description of those who are to take, and the words "share and share alike as tenants in common," being words upon which it is difficult to put any reasonable construction, children would be merely objects included in the description, and so would an only child. The limitation "if but one child, then to such only child," being, as they say, the description of an individual who would be comprehended in the terms heirs of the body; for "want of such issue," they conclude, must mean for want of heirs of the body. If the words children and child are so to be considered as merely within the meaning of the words *heirs of the body*, which words comprehend them and other objects of the testator's bounty, (and I do not see what right I have to restrict the meaning of the word "issue"), there is an end of the question. I do not go through the cases. That of *Doe* v. *Goff* [11 East, 668] is difficult to reconcile with this case — I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole, I think it is clear that the testator intended that all the issue of William should fail before the estate should go over according to the final limitation. I am sorry that such a decision is necessary: because, when we thus enforce a paramount intention, we enable the first taker to destroy both the general and particular intent. But it is

more important to maintain the rules of law than to provide against the hardships of particular cases.

LORD REDESDALE. There is such a variety of combination in words, that it has the effect of puzzling those who are to decide upon the construction of wills. It is therefore necessary to establish rules, and important to uphold them, that those who have to advise may be able to give opinions on titles with safety. From the variety and nicety of distinction in the cases, it is difficult, for a professional adviser, to say what is the estate of a person claiming under a will. It cannot at this day be argued, that, because the testator uses in one part of his will words having a clear meaning in law, and in another part other words inconsistent with the former, that the first words are to be cancelled or overthrown. In *Colson* v. *Colson* [2 Atk. 246] it is clear that the testator did not mean to give an estate tail to the parent. If he meant anything by the interposition of trustees to support contingent remainders, it was clearly his intent to give the parent an estate for life only. It is dangerous, where words have a fixed legal effect, to suffer them to be controlled without some clear expression, or necessary implication. In this case, it is argued, that the testator did not mean to use the words, "heirs of the body," in their ordinary legal sense, because there are other inconsistent words; but it only follows that he was ignorant of the effect of the one or of the other. All the cases but *Doe* v. *Goff* decide that the latter words, unless they contain a clear expression, or a necessary implication of some intent, contrary to the legal import of the former, are to be rejected. That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is, that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise. In many cases, in all, I believe, except *Doe* v. *Goff*, it has been held that the words "*tenants in common*" do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take, because they cannot take in the mode prescribed. This only follows, that, having given to heirs of the body, he could not modify that gift in the two different ways which he desired, and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties, but look to the words used in the will. The words, "for want of *such* issue," are far from being sufficient to overrule the words "heirs of the body." They have almost constantly been construed to mean an indefinite failure of issue, and, of themselves, have frequently been held to give an estate tail. In this case the words, "such issue," cannot be construed children, except by referring to the words "heirs of the body," and in referring to those words they show another intent. The defend-

ants in error interpret "heirs of the body" to mean children only, and then they say the limitation over is in default of children; but I see no ground to restrict the words "heirs of the body" to mean children in this will. I think it is necessary, before I conclude, to advert to the case of *Doe* v. *Goff*. It seems to be at variance with preceding cases. In several cases cited in the argument, it had been clearly established, that a devise to A. for life, with a subsequent limitation to the heirs of his body, created an estate in tail, and that subsequent words, such as those contained in this will, had no operation to prevent the devisee taking an estate tail. In *Doe* v. *Goff* there were no subsequent words, except the provision in case such issue should die under twenty-one, introducing the gift over. This seems to me so far from amounting to a declaration that he did not mean heirs of the body, in the technical sense of the words, that I think they peculiarly show that he did so mean — they would, otherwise, be wholly insensible. If they did not take an estate tail, it was perfectly immaterial whether they died before or after twenty-one. They seem to indicate the testator's conception, that, at twenty-one, the children would have the power of alienation. It is impossible to decide this case without holding that *Doe* v. *Goff* is not law.

In this case, even admitting it to be the general intent of the testator, to give to William an estate only for life, the remainders to the children might as easily be defeated, because William might, by agreement with the heir, have destroyed their estates before they arose. Suppose he had had a child who died, and then he had committed a forfeiture, the devisee over would have entered and enjoyed the estate. Suppose he had several children, and some had died, and some had been living, the proportions would have been changed, and after-born children would not have come in to take the shares of those who were dead. These are absurdities arising out of the construction proposed. If the testator had considered the effect of the words he used, and the rule of law operating upon them, he probably would have used none of the words in the will.

Judgment reversed.[1]

[1] "The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late; as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin, it was merely descriptive of the operation of the rule in *Shelley's Case*; and it has since been laid down in others, where technical words of limitation have been used, and other words, showing the intention of the testator, that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in *Jesson* v. *Wright*. This doctrine of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills. Another undoubted rule of construction is, that every part of that which the testator meant by the words

JORDAN *v.* ADAMS.

EXCHEQUER CHAMBER. 1861.

[*Reported* 9 *C. B. N. S.* 483.]

CHANNELL, B.[1] The question is what estate William Jordan took under the fifth head of devise in the will of John Jordan set out in the case.

The testator by his will devised the lands in dispute to trustees. By the fifth head of his will he directed and appointed the trustees to stand seised thereof, to permit the said William Jordan to occupy the same or receive the rents and profits thereof for his own use during his natural life, and, after his decease, then to permit and suffer the heirs male of the body of the said William Jordan to occupy the same or receive the rents and profits thereof for their several natural lives in succession according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan their father should direct, limit, or appoint; and, in default of such issue male of the said William Jordan, then upon trust to and for the use of his brother, Richard Jordan, and his heirs male, in such parts, shares, and proportions, manner and form as the said Richard Jordan should appoint, charged, in case the said Richard Jordan or his heirs should become seised thereof, with the sum of £2,000 in favor of the daughters, if any, of the said William Jordan.

he has used, should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject." — *Per* LORD DENMAN, C. J., in *Doe* d. *Gallini* v. *Gallini*, 5 B. & Ad. 621, 640 (1833).

"Another rule of construction has been referred to by several of the Irish as well as by some of the English judges, viz., that the general intention of the testator was to prevail over the particular intention. This doctrine, which commenced, I believe, with Lord Chief Justice Wilmot, and has prevailed a long time, had, I thought, notwithstanding the use of those terms by Lord Eldon in the leading case of *Jesson* v. *Wright*, been put an end to by Lord Redesdale's opinion in the same case, and by the powerful arguments against its adoption in Mr. Hayes's Principles, by Mr. Jarman in his excellent work on Wills, and by the judgment of the court delivered by Lord Denman in *Doe* v. *Gallini*, in which the opinion of Lord Redesdale is approved and adopted. And, certainly, if accuracy of expression is important, the use of those terms had better be discontinued, though if qualified and understood as explained in the last-mentioned case and in the opinion of some of the judges — Mr. Baron Watson, for example — it can make no difference in the result. Lord Redesdale says 'that the general intent shall overrule the particular is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless from other words it is very clear that the testator meant otherwise.'" — *Per* LORD WENSLEYDALE, in *Roddy* v. *Fitzgerald*, 6 H. L. C. 823, 877 (1858).

See also Hayes, Principles, 44, 106; 2 Jarm. Wills (4th ed.) 484 *et seq.*

But the notion that the Rule in Shelley's Case has for its object to carry out the "general intention," is very hard to kill. See *Bowen* v. *Lewis*, 9 Ap. Cas. 890, 907 (1884).

[1] The opinions only are here given.

Subject to the performance of the trusts, the testator limited and appointed the estates to the right heirs of Robert Jordan, forever.

The Court of Common Pleas decided that William Jordan took under the will an estate for life. With the greatest respect for the judgment of that court, I am of opinion that William Jordan took an estate in tail male; and that the decision appealed against ought to be reversed. I agree in the opinion expressed by my Brother *Williams* in the judgment of the court below, as reported in the 6th Common Bench Reports, N. S. p. 765, that, but for the use of the words "their father" in the power of appointment, an estate in fee would pass by the gift to the heirs male of the body of William Jordan. This consequence seems to me to follow from our giving to the words "heirs male of the body" their legal import, and from the intention apparently expressed in the will that the estate should go over to Richard Jordan and his heirs male, upon failure of the issue male of William Jordan, and not until such failure. But I am unable to concur with my Brother *Williams* in the conclusion at which — not, I think, without great doubt and hesitation — he ultimately arrived, that the words "their father" demonstrated that the words "heirs male of the body" meant "sons," or that the words "heirs of the body" could be controlled by the words "their father," in the power of appointment, as interpreting words, showing in what sense the words "heirs male of the body" had been used by the testator.

The authorities cited on the argument before us are the same as those which were cited in the Court of Common Pleas, with the exception of *Roddy* v. *Fitzgerald*, decided by the House of Lords (6 House of Lords Cases, 823). All these authorities, excepting the last, are, I believe, collected in Jarman on Wills, 2d edit., by Wolstenholme and Vincent, vol. 2, pages 267 and 299 and following pages, ch. 37, particularly in s. 3. I do not profess to reconcile all the authorities. I think it unnecessary to go through them in detail. But I may observe that the case of *White* v. *Collins*, Com. 289, much relied on by the Court of Common Pleas as an express authority, does not appear to me to be so.

The devise there was, to one for life, and, after his decease, to the heir male (in the singular), not "heirs," in the plural. There are other cases in which the word used was "heir," and not "heirs." This distinction is not, I think, immaterial. The word "heir" may be understood as pointing to an individual, whereas the word "heirs" points to a class.

The leading cases appear to me to be *Jesson* v. *Wright*, 2 Bligh, 1, and *Roddy* v. *Fitzgerald*, 6 House of Lords Cases, 823.

The rule in *Jesson* v. *Wright*, as I understand it, is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise. *Roddy* v. *Fitzgerald* upholds and explains the former case of *Jesson* v. *Wright*. These decisions appear to me to give the rule of construction which we must apply to the present case. In *Roddy* v. *Fitzgerald* the opinions

of the judges, both in Ireland and in England, were reviewed by the House of Lords. In their opinions the judges were nearly equally divided; indeed, but for a circumstance noticed by Lord Chancellor Cranworth in the report of the case, the opinions of the judges would have been equally divided. In unison with the opinions expressed by a minority of the judges, I humbly submitted that the words "issue" in *Roddy* v. *Fitzgerald*, — words more flexible than "heirs of the body," — had been in that case by the whole context of the will explained and interpreted by the testator himself to mean "children." The House of Lords unanimously rejected this construction, and held that the words "issue" there used must have their ordinary legal import and effect.

This case of *Roddy* v. *Fitzgerald* is treated by the Court of Common Pleas as deciding that words that would create an estate tail are to have that effect, unless a judicial mind sees with reasonable certainty from other parts of the will that the testator's intention was that those words should not operate as words of limitation of the inheritance, but should be words of purchase, creating an estate in remainder in the persons coming within the designation of heirs male of the body, and within the further description contained in the will.

This is no doubt so. But if, by reference to the words "their father," in the power of appointment in the will in question, the words "heirs of the body" are explained to be, and are to be read as, sons (the only ground on which, as it appears to me, the decision of the Court of Common Pleas can be supported), then it would seem to me to follow, that, if William Jordan had died having had an only son who had died in his lifetime, but had left a son who survived his grandfather, such grandson would take nothing under the will. I cannot suppose this to have been the testator's intention; and I am therefore unable to adopt the argument that the testator has interpreted the words "heirs of the body" as meaning "sons."

In determining whether the legal import of the words "heirs of the body" is to be cut down, we must not surmise, but must see very clearly that the alleged interpreting words do cut down other words which carry with them a recognized legal meaning.

Consistently with *Roddy* v. *Fitzgerald*, I cannot hold, either from the power of appointment or the general context of the will, that such was in the present case the intention of the testator.

I am of opinion that the judgment of the Court of Common Pleas ought to be reversed.

MARTIN, B. This is an appeal from the judgment of the Court of Common Pleas: and the question is, whether, upon the construction of a devise in the will of John Jordan, dated the 8th of May, 1825, William Jordan took an estate in tail male. The substance of the devise is as follows: "As to certain land (describing it), I direct my trustees to stand seised thereof, and permit William Jordan to occupy the same or receive the rents and profits thereof for his own use during his natural life; and, after his decease, then to permit and suffer *the*

heirs male of his body to occupy the same or receive the rents and profits thereof for their several natural lives in succession according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan, *their father*, should by deed or will, duly executed, direct, limit, or appoint; and, in default of such issue male of the said William Jordan, then upon trust to and for the use of Richard Jordan and his heirs male, in such parts and proportions, manner and form, as he should by deed or will direct or appoint, but charged with the sum of £2,000 for the daughters (if any) of the said William Jordan; and after the performance of the said trusts, and subject thereto, that the said trustees should stand seised of the said lands to and for the use of the right heirs of Robert Jordan, forever." The Court of Common Pleas were of opinion that William Jordan took an estate for life only. All agree that the true rules of construction are laid down in *Jesson* v. *Wright*, 2 Bligh, 1, and *Roddy* v. *Fitzgerald*, 6 House of Lords Cases, 823. If the devise had not contained the powers of appointment, I apprehend there would have been no doubt but that it would have given an estate in tail male to William Jordan. It would have been a devise to him for life, and, after his death, to the heirs male of his body, to occupy the same or take the rents and profits for their several natural lives in succession, according to their respective seniorities, and, in default of such issue male, to Richard Jordan. This would express the intention of the testator that William Jordan should have the land for his life, and that, after his death, his male heirs as a class, that is, in succession according to their respective seniorities, should have it. It is true it was his intention that they should have it for their lives only, and with no greater power over it than tenants for life have: but this the law does not permit; and it seems to me nothing more than the expression of an intention which by law cannot be effected. Applying the rule in *Shelley's Case*, 1 Co. Rep. 93 a, which is a technical rule of law, and the doctrine of *Jesson* v. *Wright* and *Roddy* v. *Fitzgerald*, by construction of law the estate of William Jordan would be an estate in tail male. I think it impossible to express more clearly than these words do the original estate tail contemplated by the Statute de Donis, viz. an estate for life in the donee, and a series of life-estates continuing so long as there were heirs of the body of the donee, they taking in succession in the order and according to the rule of lineal inheritance. This is what an estate tail in substance was, until the courts of law converted it for all practical purposes into an estate in fee simple.

The judgment of the Common Pleas is, that William Jordan took an estate for life, and that the words "heirs male of his body" meant "sons;" so that, if he had died having had an only son, who had died in his father's lifetime, leaving a son who survived his grandfather, this grandson would take nothing under the devise. Is this correct either in construction of law or as the true expression of the will of the testator? The cases of *Jesson* v. *Wright* and *Roddy* v. *Fitzgerald*

are authorities that the words "heirs of the body" have not only a plain natural meaning, but are also words of known legal import, and *prima facie* denote and mean the whole of the descendants or issue as a class, and are to be read and understood in this their natural and legal sense, unless it be clear that the testator intended to use them in a different sense. Lord Wensleydale's expression in *Roddy* v. *Fitzgerald* is, "unless a judicial mind sees with reasonable certainty from other parts of the will an opposite intention."

I agree with Mr. Justice Williams that the only other parts of this will to show the opposite intention are the words "their father," in the power of appointment. The testator certainly wished that the heirs of his body should take life-estates. This is what nine tenths — probably ten tenths — of testators who make entails wish; but there is nothing in the expression of it to show that he desired that the grandchildren or more remote descendants of William should not take at all. If the words had been "the father," or "the ancestor," I apprehend they could not have had the effect of altering the legal import of the words "heirs male of the body." And, in my opinion, that which the testator has expressed, and in all probability meant and intended, was, that William Jordan should have a power to appoint amongst his *sons*, but not that the estate or estates previously given to the heirs male of his body should be altered or affected otherwise or beyond the alteration effected by the exercise of the power.

It appears to me that the use of the words "in default of such issue," and not "in default of such sons," strongly confirms this view. Had the words used been "in default of issue," I should have thought it conclusive. Suppose that William Jordan were dead, and the litigant parties were his grandson and Richard Jordan,— can it be said that a judicial mind would clearly see from the language of the will that the testator meant Richard to take, and not the grandson? I think not; and, to decide against the grandson, the law requires that this must be made out, and that clearly. The result is, to say the very least, that I do not think there is sufficient in the will to justify the alteration or cutting down of the words "heirs male of the body," which are words having a plain, clear, natural meaning, and are also technical words of a known legal import and meaning, into "sons." I cannot bring my mind to the conclusion that the testator has expressed his will to be that Richard Jordan should take in exclusion of William's grandchild.

If there were any decision upon the point, I would readily yield; but none has been cited before us. It is said in the judgment of the Common Pleas that the case of *White* v. *Collins*, 1 Comyns, 289, is in point for the defendant. I do not agree in this at all. The devise there was to a son, F., to enjoy during his life, and, after his death, to the heir male of the body of F. (in the singular number), during the term of his natural life, and, for want of such heir male, to another son, C., a brother of F.'s. Whatever doubts may have existed at the

time when this case was decided, the works of Mr. Fearne, a subsequent writer, have abundantly cleared them up: and it seems to me that the words of that will clearly express, that, by the word "heir," was meant an individual, and not the heir of the body of F. as a class.

I quite concur with Mr. Justice Blackstone (1 Hargr. Tracts, page 505) that common-sense showed the meaning of the expression used. I concur also with the Court of Common Pleas as to the importance of adhering to the doctrine of *Jesson* v. *Wright*, confirmed in *Roddy* v. *Fitzgerald*; and I do so in expressing my opinion that William Jordan took an estate tail.

WIGHTMAN, J. I am of opinion that the judgment of the Court of Common Pleas is right, and that the plaintiff took only an estate for life in the premises in question, and not an estate tail, either legal or equitable.

The testator by his will devised all his freehold and leasehold estates to trustees, and directed them, as to the premises in question, "to permit and suffer the plaintiff to occupy and enjoy or to receive and take the rents, issues, and profits thereof for his own use and benefit during his natural life, and, after the decease of the plaintiff, then to permit and suffer *the heirs male of his body* to occupy and enjoy the same or to receive and take the rents, issues, and profits thereof for their several natural lives, in succession, according to their respective seniorities, *or* in such parts and proportions, manner and form, and *amongst them*, as the said William Jordan (the plaintiff), *their father*, should by deed or will direct; and, in default of such issue male of the said William Jordan, then over.

The question is, whether the words "heirs male of his body," as used in this devise, are words of limitation or words of purchase; and it appears to me, that, taking the whole clause together, they are words of purchase, and mean the sons of the plaintiff, who are to take for their lives in succession, according to seniority or in such proportions, manner and form amongst them as their father (the plaintiff) should by deed or will direct. I am unable to give any other meaning to the clause in question; and, though, by the use of the words "heirs male of the body," the testator may be supposed to have intended to give an estate in tail to the plaintiff, as those words standing alone and unexplained by the rest of the clause would be words of limitation and not of purchase, yet the subsequent words, that they (the heirs male) are to take the profits, &c., of the estate for their natural lives in succession, according to their respective seniorities, or in such manner as their father shall by deed or will direct, show too clearly in my opinion to admit of doubt, that the testator, by "heirs male of the body," meant the "sons" of the plaintiff, who were to take in succession for life, or in such parts and proportions between them as their father should direct.

I have forborne to observe upon the cases which were cited upon the argument, the question in all the cases, as in this, being, what was the

intention of the testator by the terms he used in his will; and as everything depends upon the words used, it seems to me that little assistance is derived from decisions upon terms which are not the same as those used in the will in question. I therefore think, drawing my conclusion from the terms actually used by the testator in this case, that the court below was right in the conclusion to which it came, and that the judgment should be affirmed.

COCKBURN, C. J. I am of opinion that the judgment of the Court of Common Pleas should be affirmed; but being unable to concur in all the reasons on which the decision of the majority of that court appears to have been founded, I think it necessary to explain the grounds on which the conclusion I have arrived at is based.

We are called upon to construe a devise, whereby a testator gives certain estates to trustees, in trust to permit one William Jordan to occupy and enjoy or to receive and take the rents and profits for his own use and benefit, during his natural life, and, after his decease, to permit and suffer the heirs male of his body to occupy and enjoy the same, or to receive and take the rents and profits, for and during their natural lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, and amongst them, as the said William Jordan, their father, shall by deed or will duly executed and attested direct, limit, and appoint; and, in default of such issue male of William Jordan, then over.

The question is, whether under this devise William Jordan (who is the plaintiff in this action) took an estate for life or an estate tail; or — to put the same thing in another form —whether the heirs male of his body took an estate by purchase or by descent.

Three things occurring in this devise are relied on to take it out of the ordinary rule that a gift to a man for life, with remainder to the heirs of his body, creates in point of law an estate tail in the ancestor. These are, first, that the devise to the heirs is for their natural lives; secondly, that their estate is subject, with reference both to the order of succession and quantity of estate, to the appointment of the ancestor; thirdly, that the ancestor is distinctly described as the father of the heirs male of the body, from which it is said to be plain that the words "heirs male of the body" must necessarily be read as *sons*.

I am of opinion that, in construing this devise, the two first circumstances cannot be taken into account. I take the effect of the authorities on this subject clearly to be, that where land is devised to a man for life, with remainder to his heirs or the heirs of his body, no incident superadded to the estate for life, however clearly showing that an estate for life merely, and not an estate of inheritance, was intended to be given to the first donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance, nor any declaration, however express or emphatic, of the devisor, can be allowed, either by inference or by the force of express direction, to qualify or abridge the estate in fee or in tail, as the case may be, into

which, upon a gift to a man for life, with remainder to his heirs, or the heirs of his body, the law inexorably converts the entire devise in favor of the ancestor, notwithstanding the clearest indication of the intention of the donor to the contrary. Thus, with reference to the estate for life, although the donor may have superadded to it some incident of an estate of inheritance, — for instance, as in *Papillon* v. *Voice*, 2 P. Wms. 471, unimpeachability of waste, — or, as in *King* v. *Melling*, 2 Lev. 58, a power of jointuring, both which provisions would have been superfluous if an estate of inheritance had been intended; or although, as in *Coulson* v. *Coulson*, 2 Str. 1125, he may have interposed trustees to preserve contingent remainders, — a provision palpably inconsistent with the estate of the ancestor being other than an estate for life; or though he may have declared in express terms, as in *Perrin* v. *Blake*, 4 Burr. 2579, 1 Sir W. Bl. 672, that his intention in creating the estates for life was to prevent any of his children from disposing of his estate for longer than his life; or although, as in *Robinson* v. *Robinson*, 1 Burr. 38, he may have expressly declared that the estate for life should last for the life of the devisee and *no longer;* or, as in *Roe d. Thong* v. *Bedford*, 4 M. & Selw. 362, has declared that the devisee should have no power to defeat his intent,— none of these provisions or declarations will avail anything. So, on the other side, with reference to the estate to the heir, although the devisor may have annexed to it incidents wholly inconsistent with an estate by descent, — as, that the heirs shall take according to the appointment of the ancestor (as in *Doe d. Cole* v. *Goldsmith*, 7 Taunt. 209), or that the heirs shall take as tenants in common (as in *Bennett* v. *The Earl of Tankerville*, 19 Ves. 170), or share and share alike (as in *Jesson* v. *Wright*, 2 Bligh, 1), or without regard to seniority of age (which, though held in *Doe d. Hallen* v. *Ironmonger*, 3 East, 533, to prevent the operation of the rule, would nowadays, it seems, receive an opposite construction; see 2 Jarm. Wills, 303), — no inference arising from such provisions can be allowed to prevail against the rule of law; nay, even although a devisor should expressly declare that the heirs should take by purchase and not by descent, the declaration would be set aside as unavailing (see Harg. Law Tracts, 562).

When once the donor has used the terms "heirs," or "heirs of the body," as following on an estate of freehold, no inference of intention, however irresistible, no declaration of it, however explicit, will have the slightest effect. The fatal words once used, the law fastens upon them, and attaches to them its own meaning and effect as to the estate created by them, and rejects, as inconsistent with the main purpose which it inexorably and despotically fixes on the donor, all the provisions of the will which would be incompatible with an estate of inheritance, and which tend to show that no such estate was intended to be created; although, all the while, it may be as clear as the sun at noonday that by such a construction the intention of the testator is violated in every particular.

Such being the principle involved in the decisions of the House of Lords in the cases of *Perrin* v. *Blake*, 4 Burr. 2579, 1 W. Bl. 672; *Jesson* v. *Wright*, 2 Bligh, 1; and *Roddy* v. *Fitzgerald*, 6 House of Lords Cases, 823, it appears to me that we cannot give any effect to the provisions of this devise that the heirs shall take by appointment, or, in default of it, in succession, for their natural lives. If, indeed, the matter were *res integra*, I should entirely concur with the majority of the Court of Common Pleas in thinking that these provisions ought to be conclusive as to the intention of the testator. Speaking under the shadow of the great names of Lord Mansfield and Lord Ellenborough, and the eminent judges of the Court of Queen's Bench who were parties to the decisions of that court in *Perrin* v. *Blake* and *Doe d. Strong* v. *Goff*, 11 East, 668, and of those who in the Common Pleas decided the cases of *Crump d. Woolley* v. *Norwood*, 7 Taunt. 326, and *Gretton* v. *Haward*, 6 Taunt. 94, I have no hesitation in saying, that, but for the decisions of the supreme court of appeal, I should certainly have held that an arbitrary rule of law as to the effect of certain words might well be made to yield, as similar rules have in other instances been made to yield, in construing a devise, to the rule, — one of paramount importance in construing wills and devises, — that effect is to be given to the intention of the testator; conformity to which is in my opinion ill obtained by forcing on the testator a meaning directly the reverse of what he really intended. But we are, of course, bound by the decisions of the House of Lords; and as the law has been there settled, so we must apply it.

But although the rule thus established is inflexible to the extent I have stated, there is, nevertheless, one quarter from which it permits light to be let in and effect to be given to the real intention of the testator: this is where by some explanatory context, having a direct and immediate bearing upon the term "heirs," or "heirs of the body," the devisor has clearly intimated that he has not used these words in their technical, but in their popular sense, namely, that of sons, daughters, or children, as the case may be. An illustration of this branch of the rule is given by Lord Brougham in his judgment in *Fetherston* v. *Fetherston*, 3 Cl. & F. 67: "If there is a gift to A. and the heirs of his body, and then, in continuation, the testator, referring to what he had said, plainly tells us that he used the words 'heirs of the body' to denote A.'s first and other sons, then clearly the first taker would only take a life estate."

This appears to me to be directly applicable to the present case, with reference to the direction of the testator, following immediately on the devise to the heirs male of the body of William Jordan, that they shall take "in such parts, proportions, manner, and form, and amongst them, as the said William Jordan, *their father*, shall direct." We cannot reject these words: there is no authority for saying that the particular intent is to yield to the general one, — at all times an unsatisfactory rule, — to the extent that, where the testator has him-

self afforded a clear indication of the sense in which he has used the words, we are to reject his own interpretation, in order to preserve the legal effect of the term "heirs of the body:" on the contrary, the cases of *Lowe* v. *Davies*, 2 Ld. Raym. 1561 (*per nom. Law* v. *Davis*, 2 Stra. 849, 1 Barnard. 238), of *Lisle* v. *Gray*, 2 Lev. 223, and *Goodtitle d. Sweet* v. *Herrin*, 1 East, 264, 3 B. & P. 628 (in which last case the judgment of the Queen's Bench was affirmed in the House of Lords), and the cases of *North* v. *Martin*, 6 Sim. 266, and *Doe d. Woodall* v. *Woodall*, 3 C. B. 349, establish conclusively, that where, following on a gift to heirs of the body, the term "son or sons," "daughter or daughters," or "child or children," is used in apposition, as it were, to the term "heirs of the body," the latter is to be taken in its more restricted and not in its legal sense. The cases of *Pope* v. *Pope*, 14 Beav. 591; *Gummoe* v. *Howes*, 23 Beav. 184; and *Smith* v. *Horsfall*, 25 Beav. 628, are equally in point as establishing that the same effect is produced in limiting the term "issue," which, when unexplained by the context, has, as is now well established, the same force as the term "heirs of the body." In *Smith* v. *Horsfall*, the Master of the Rolls says: "Issue here means children; and such is its signification in all cases where a direct reference is made to the parent of the issue. I entertain no doubt on the point; and I should be unsettling the law if I were to hold the contrary."

It is quite plain, according to these authorities, that if, in the present devise, the devisor, after the gift to the heirs male of the body of William Jordan, had gone on to say, "the said sons of the said William Jordan to take in such parts, &c., as the said William Jordan shall appoint," this direction must have had the effect of giving to the term "heirs male of the body" the more limited meaning of "sons." Now this although in another form, the testator has to all intents and purposes done; for what possible difference can there be between speaking of the heirs of the body as the sons of the first taker, and of the first taker as the father of the heirs? Instead of using the one form of expression, the testator has used the correlative and corresponding one, and one altogether equipollent in effect. He has given his own key to the meaning of the words "heirs of the body of William Jordan," namely, those heirs of the body of William Jordan of whom William Jordan is the father; that is, the sons of William Jordan. The authorities are as strong for giving effect to such an exposition of a testator's meaning of the term "heirs of the body," where it exists, as for enforcing the technical meaning where it does not. We have no right, as it seems to me, to reject these words, or to hold them to mean something else, so as to give to William Jordan an estate tail; more especially as all the other provisions of the devise lead only to the conclusion that the testator never entertained the intention to give him any such estate.

Nor am I embarrassed by the use of the words "in default of such issue," which follow in the ensuing limitation. The word "issue" is, as every one knows, a flexible term; if the term "heirs of the body"

can be controlled by an explanatory context, the term "issue" cannot be less susceptible of being modified in like manner. The "issue" here spoken of are plainly the same as were previously spoken of as "heirs male of the body." If the latter are shown by the context to have been the sons of William Jordan, such also must be the meaning of the term "such issue."

The judgment of the House of Lords in the case of *Roddy* v. *Fitzgerald*, which was pressed on us in the argument, does not, as it appears to me, conflict with this view. It was not at all intended by that decision, as I read the judgments of Lord Cranworth and Lord Wensleydale, to overrule the numerous cases at common law and in equity to which I have last referred; or all that class of cases (collected in 2 Jarm. Wills, 273–277), in which the term "issue" has been cut down to mean sons, daughters, or children, by the testator having used one or other of those terms in the context of the will. Lord Cranworth expressly says, — "Where the testator shows upon the face of his will that he must have used technical words in another than their technical sense, there is no rule that prevents us from saying that he may be his own interpreter:" and again, "The word 'issue' when used in a will is *prima facie* a word of limitation; but if the context makes it apparent that the word is not so used, then it may be treated as a word of purchase." The question in the case, as put by Lord Cranworth, was, whether in a devise to testator's son William for life with remainder to his issue, in such manner, shares, and proportions as he should appoint, and in default of such appointment, then to the issue equally, if more than one, and if only one child, to the said child; and on failure of issue, over, — there was anything in the context to control the ordinary effect of the term "issue." And the House of Lords held that there was not. "Issue" being, as was pointed out by Lord Wensleydale, *prima facie* equivalent to heirs of the body, the direction that the heirs should take according to the appointment of the ancestor, or, in default of appointment, in equal shares, was altogether inoperative, as settled by the authority of *Jesson* v. *Wright*. The further provision, which seems to have been added by the testator unnecessarily and *ex nimia cautela*, that in the event of there being but one child, that child should take the whole, did not appear to their Lordships strong enough to control the larger sense of the word "issue." But there is nothing to show that, if the context had been sufficiently clear and strong for that purpose, their Lordships would not have given effect to it. On the contrary, as I have pointed out, Lord Cranworth's language is a clear recognition of the existence of the rule as I have stated it farther back. Looking at that language, I cannot but think that if, in *Roddy* v. *Fitzgerald*, the testator had, as in the present instance, described the first taker as the *father* of those whom he spoke of as his issue, effect would have been given to so striking an exposition of his meaning. I find no intimation of any intention to overrule the numerous cases already referred to in which

the more general terms "heirs of the body" and "issue" have been restricted, by words used in juxtaposition importing issue in the first generation only, to the latter more limited meaning. Nor can I suppose that their Lordships would have overruled such a series of authorities silently, and, as it were, by implication, or without a clear intimation of their intention to do so. I therefore consider them as still in force and binding upon us.

Being, then, of opinion that the devisor has afforded a clear indication of the sense in which he has used the term "heirs male of the body," namely, that of sons, — from which, of course, it would follow that no estate of inheritance was created, and that consequently William Jordan took only an estate for life, — I hold — but on this ground alone — that the judgment of the Court of Common Pleas should be affirmed.

The court being thus equally divided, the Lord Chief Justice intimated that if the parties wished to carry the case further, one of its members would withdraw his opinion, so that the judgment of the Court of Common Pleas might stand. *Affirmed.*

Kemplay (with whom was the *Solicitor-General*), for the appellant.
Bovill, Q. C. (with whom was *Archibald Smith*), for the respondent.

NOTE. — "When an estate is limited to a husband and wife, and the heirs of their two bodies, the word '*heirs*' is a word of limitation, because an estate is given to both the persons, from whose bodies the heirs are to issue. But when it is given to one only and the heirs of two (as to the wife and the heirs of her and A. B.), there the word '*heirs*' is a word of purchase. For no estate tail can be made to one only, and the heirs of the body of that person and another. This appears from Lit. § 352, according to the true reading collected from the original editions. The common editions make the estate *Cypres*, therein mentioned, to be to the widow and, '*les heirs de corps sa baron de luy engendres*,' which is not as near as might be to the original estate intended if the husband had lived, viz. to the husband and wife and the heirs of their two bodies. But the original edition by Lettou and Macklinia in Littleton's life-time, and the Roan edition, which is the next (both which my Brother Blackstone has), read it thus, '*les heirs de les corps de son baron et luy engendres;*" which is quite consonant to the original estate. And this estate to the widow for life, and the heirs of the body of her husband and herself begotten, Littleton, in the same section, declares not to be an estate tail. The same is held in Dyer, 99, — in *Lane* and *Pannel*, 1 Roll. Rep. 438, and in *Gossage* and *Taylor*, Styles, 325; which, from a manuscript of Lord Hale in possession of my Brother Bathurst, appears to have been first determined in Hil. 1651; which accounts for some expressions of Chief Justice Rolle in *Style's Case*, which was in T. Pasch. 1652. There it was expressly held, that this was a contingent remainder to the heirs of both their bodies. The only difference of these three cases from the present is, that there the wife had an express estate for life, and here not. But upon legal principles the cases are just alike. An estate 'to A. and the heirs of his body,' is the same as an estate 'to A. for life, remainder to the heirs of his body.' We are therefore all of opinion that this was a contingent remainder to the issue, and not being capable of taking effect at the determination of the particular estate, is therefore gone forever." — *Per* WILMOT, C. J., in *Frogmorton* v. *Wharrey*, 2 W. Bl. 728, 731 (1770). See Fearne, C. R. 38; 2 Jarm. Wills (4th ed) 340-343.

On Possibilities of Reverter, see Gray, Perpetuities, §§ 13, 14, 31–41; and on the creation and transfer *in futuro* of rights in others' lands, *e. g.*, rents, see Id. §§ 16, 17, 43.

CHAPTER IV.

FUTURE USES.

ADAMS *v.* SAVAGE.

KING'S BENCH. 1703.

[*Reported* 2 *Ld. Raym.* 854.]

A *scire facias* was sued by the plaintiff as administrator to J. S. upon administration granted to him by the archdeacon of Dorset, upon a judgment recovered by the intestate against Savage in this court. And the issue after pleading was, whether Savage was seised of the lands, etc., in fee? Upon which the jury found a special verdict, that Savage being seised in fee, conveyed the lands by lease and release to trustees and their heirs, to the use of himself for ninety-nine years, if he should so long live, remainder to the trustees for twenty-five years, remainder to the heirs male of his body, remainder to his own right heirs. And the question was, if Savage during his life, not having heirs male of his body, should have a use result to him for his life, and so become tenant in tail in possession; or if no use could result, and then there being no freehold to support the contingent remainder to the heirs male of the body of Savage, the said remainder would be void, and Savage seised in fee as before. And this was argued by *Mr. Eyre* for the plaintiff, and by *Mr. Serjeant Darnall* for the defendant, Hilary Term last, and this term. And the court held, that no use could result to Savage during his life, and therefore the remainder to the heirs male was void, and Savage seised in fee. And their reasons were, because the limitations to himself for ninety-nine years, and to the trustees for twenty-five years, and the heirs male, were new uses and new estates. As if a man by lease and release, or by covenant to stand seised, limit the use to himself for life, or in tail, these are new estates, and not parcel of the old estate, according to 7 Co. 13 b, *Englefield's Case*. And where in such case upon a conveyance such uses are limited, as (supposing the limitations to be good) would pass the whole estate, there no use will result contrary to the express limitations of the party. But if the limitations are void, the conveyance of necessity will fail. If a man seised in fee convey his estate by lease and release to the use of himself for life, remainder to trustees for their lives, remainder to the heirs of his body; he hath an estate tail in him, but he is but tenant for life in possession: otherwise if there had been no intermediate estate in the trustees for their lives. And in the former case, if a man makes

a feoffment, it is no discontinuance, but only divests the estate. And for the same reason in this case, where the first limitation is only for years, the remainder to the heirs of the body of the tenant for years is a contingent remainder, and void. These are the reasons of the CHIEF JUSTICE HOLT.

And POWELL, JUSTICE, said, that there was a difference, where the limitation was upon a covenant to stand seised, and where upon a lease and release. For where the limitations are to take effect out of the estate of the covenantor, there if the limitations were such as could not take effect immediately, or not till after the death of the covenantor, as in the case of *Pybus* v. *Midford*, 2 Lev. 75, there the law may mould the estate remaining in the covenantor into an estate for life; but that cannot be where the limitations are to take effect out of the estate of the trustees for want of a limitation, much less against an express limitation. And therefore (by him) if there had been an express limitation in the case of *Pybus* v. *Midford*, limited to the covenantor, the judgment would have been otherwise. And for these reasons the whole court ordered last Hilary term, that judgment should be entered for the plaintiff, unless cause should be shown to the contrary the first day of this term. And the first day of this term *Darnell*, Queen's Serjeant, showed for cause, that the plaintiff could not have judgment, because it appeared upon the *scire facias* that he was not intituled to it; because the administration was granted to him by the archdeacon of Dorset, and therefore the grant of it was void; for the judgment of this court, upon which the *scire facias* is founded, is *bona notabilia*. 2. If it will not make *bona notabilia*, yet this grant of administration will be void *quoad* this judgment, because it lies out of the limits of the jurisdiction of the archdeacon of Dorset. Against which it was urged by *Mr. Eyre* for the plaintiff that this court cannot take notice of the boundaries of dioceses; and it may be, that this court is within the archdeaconry of Dorset, for that archdeaconry may be within the diocese of London; and this court will not intend the contrary, since the contrary does not appear to them. But *per* HOLT, CHIEF JUSTICE, this court will take notice of the limits of ecclesiastical jurisdiction, which is part of the law of the realm, under which we live; and consequently it will take notice, that a judgment of the King's Bench is not within the jurisdiction of the archdeacon of Dorset. And for this reason the whole court held, that judgment ought to be given for the defendant.[1]

[1] *Rawley* v. *Holland*, 22 Vin. Ab. 189, pl. 11 (1712), *accord*. See Gray, Perpetuities, §§ 58–60.

ROGERS *v.* EAGLE FIRE COMPANY.

NEW YORK COURT FOR THE CORRECTION OF ERRORS. 1832.

[*Reported* 9 *Wend.* 611.]

ERROR from the Supreme Court. The Eagle Fire Company of New York commenced an action of ejectment against Halsey Rogers for the recovery of a house and lot in the city of New York, and on the trial of the cause in December, 1828, deduced title to the premises as follows: 1. It was admitted by the defendant that one John Deitz owned and possessed the premises in question on the 3d July, 1799. 2. The plaintiffs gave in evidence a deed executed by John Deitz to Abraham Buice, bearing date 3d July, 1799, in the words following: "To all to whom these presents shall come or may concern, know ye that I, John Deitz, of the city of New York, in consideration of the performances hereinafter mentioned, have given, granted, aliened, enfeoffed and confirmed, and by these presents do give, grant, alien, enfeoff, and confirm unto my son-in-law, Abraham Buice, all my estate, both real and personal, and the reversion and reversions, remainder and remainders; to have and to hold the said premises, and every part and parcel thereof, unto the said Abraham Buice, his heirs and assigns forever. Provided always, and upon this special trust and confidence nevertheless, and upon this express condition, that he, the said Abraham Buice, his heirs, executors, administrators, and assigns, shall and do permit and suffer me to be and remain in possession, and to use and enjoy all and every my said estate, both real and personal, during my natural life, without yielding or paying anything therefor, or in respect thereof, and not otherwise. And further, that from and after my decease, the said Abraham Buice, his heirs, executors, and administrators, shall well and truly pay unto Frederick Howell one hundred pounds; and also to deliver unto the said Frederick Howell two feather beds and all my wearing apparel. And further, that during my natural life the said Abraham Buice, his heirs, executors, and administrators, shall and will find and provide me with good meat and drink, washing and lodging; and the said Abraham Buice is to occupy and be in possession of my house situate at the corner of Eagle Street, for which he is to allow me sixty pounds a year during my natural life. And further, I am to assist the said Abraham Buice in repairing the buildings. And further, I do hereby promise that I will pay and discharge all debts and encumbrances on my said estate, except three hundred and forty-five pounds, which is to be paid out of my estate, for which I am to allow the said Abraham Buice interest after my debts are paid; and that from and after my decease, he, the said Abraham Buice, his heirs, executors, administrators, or assigns shall, or lawfully may have, hold, and enjoy the premises hereby granted, and every part

and parcel thereof, and dispose thereof, and convert the same to his and their own proper use and behoof, as he or they shall think fit. In witness," &c. 3. The plaintiffs gave in in evidence a deed from Abraham Buice to Peter Crawbuck, bearing date 11th July, 1803, whereby, for the consideration of £1,600, the grantor bargained and sold to the grantee in fee two lots of ground situate in the city of New York, distinguished as numbers 78 and 79 on a certain map in the deed described, reciting that the said two lots had been conveyed by John Deitz as part of his real estate to the grantor, and which deed contained covenants of seisin and for further assurances. 4. A *mortgage* from Peter Crawbuck to the plaintiffs, bearing date 19th June, 1816, conveying one of the lots described in the last preceding deed, for the purpose of securing the payment of the sum of $4,000 on or before the 1st January, 1817. 5. The plaintiffs proved that the premises described in, and conveyed by the mortgage executed by Crawbuck, are the same premises mentioned in the paragraph of the deed first above set forth from Deitz to Buice in these words: "and the said Abraham Buice is to occupy and be in possession of *my house, situate at the corner of Eagle Street.*" They further proved that Buice resided on the premises three or four years; that Deitz lived a portion of that time with him; that Buice was dead; that Crawbuck purchased the premises in question about a year or two years after the death of Deitz, and built a three-story house on the premises, and that one Stuart, a son-in-law of Crawbuck, lived in the house when he was dispossessed. That at the time when Stuart was dispossessed, one D. Brooks, who occupied a part of the house under Stuart, was also dispossessed; that Brooks afterwards took a lease of the house from an agent of one Frederick Howell, who was lessor of the plaintiff in a former suit, and that a suit for the mesne profits was commenced against Brooks, which was still pending. It was further shown that in 1820 the father of D. Brooks hired the premises in question of Crawbuck; that in 1825 he took a lease of the premises from the agent of Frederick Howell, and soon after became the tenant of the *defendant*, and died in possession in January, 1827. It was admitted that the defendant was in possession at the commencement of the suit.

The defendant then gave in evidence the *last will* and testament of John Deitz, executed in due form of law to pass real estate, bearing date 26th December, 1798, whereby the testator, after giving a small pecuniary legacy to a friend, and devising a tract of land in Kentucky to another, devised all the rest, residue, and remainder of his real and personal estate to his nephew, Frederick Howell. The defendant further gave in evidence a deed from Frederick Howell to the defendant, bearing date the 29th June, 1825, whereby, for the consideration of $1,000, the grantor conveyed to the grantee lots number 78 and 79, being the same lots above mentioned as conveyed by Buice to Crawbuck. On this evidence a verdict was taken for the plaintiff, subject to the opinion of the Supreme Court on a case to be made; either

party to have leave to turn the same into a special verdict or bill of exceptions.

In the Supreme Court judgment was rendered for the plaintiffs; whereupon the case was turned into a special verdict, and the defendant sued out a writ of error.

B. F. Butler and *S. Talcot*, for the plaintiff in error.

G. Wood and *S. Boyd*, for the defendants in error.

By the Chancellor [Walworth]. The right of the lessors of the plaintiff in this case depends upon the validity of the deed of the 3d of July, 1799, from J. Deitz to A. Buice. If the deed was valid, as to any part of the premises contained therein, it was a revocation of the will of November, 1798, *pro tanto*, and nobody but the heirs at law of the testator had any title to the land, or the right to enter for the breach of a condition subsequent, even if it had been expressly found, by the special verdict, that the grantee did not provide meat, drink, washing and lodging for the grantor during his life, or pay to the nephew the £100 mentioned in the deed, and that Howell entered for the breach of those conditions. There can be no doubt that the conveyance of July, 1799, would have been good, as a deed of feoffment of the lot now in controversy, if it had been accompanied with livery of seisin. It was in fact a conveyance of this lot for the life of the grantor, subject to an annual rent of £60, with a remainder to the grantee in fee, without rent; both the life estate and the remainder, however, being subject to the conditions mentioned in the deed, all of which, as to this particular lot, were conditions subsequent. If, therefore, it had appeared that the grantee and those claiming under him had been in possession for more than twenty years from the date of the deed, it probably would have been the duty of the jury to presume livery of seisin, so as to give effect to the conveyance of this lot as a feoffment at common law. See *Carroll* v. *Norwood*, 1 Har. & Johns. R. 174. *Biden* v. *Loveday*, 1 Vern. 196. *Rees* v. *Lloyd*, Wight. R. 123. 1 Prop. Law, N. S. 104. But in such cases the fact of livery of seisin must be found by the special verdict. The court cannot adjudge it to be a good feoffment merely from the finding of evidence, in a special verdict, which would have authorized the jury to find the fact presumed. In a special verdict the jury must find the facts, and not the evidence of the facts. *Henderson* v. *Allen*, 1 Hen. & Munf. 235; and where certain evidence authorizes the jury to presume a fact, the court cannot presume the fact from a special verdict, setting out the evidence only. The rule is otherwise where a presumption of law arises from the finding of certain facts. Thus in the case of *Isack* v. *Clarke*, 1 Roll. R. 132, Lord Coke says, "If a deed of feoffment were given in evidence made forty years previous, if possession had gone according to the deed, although it could not be proved that livery was made, this would be good evidence for the jury; and that he would direct them to find a livery, for it should be presumed." But if the jury found all these matters specially, the court could not adjudge this to be a good feoffment without livery. In

such a case, if all the evidence necessary to presume the fact is found by the special verdict, but the verdict is imperfect in not finding the fact itself, which ought to have been presumed by the jury, a *venire de novo* may be awarded to supply the defective finding by the jury. See *Bird* v. *Appleton*, 1 East's R., note *a*; 3 Taunt. R. 209. *Henderson* v. *Allens*, 1 Hen. & Munf. 239. But not where the evidence found by the jury is not sufficient to have authorized them to presume the fact necessary to be established. *Witham* v. *Earl of Derby*, 1 Wils. R. 55.

These principles are equally applicable to the claim of the lessors of the plaintiff, arising from the Statute of Limitations. To bar the right of the real owner by adverse possession, it is necessary that the premises should have been held adversely for the space of twenty years, by the person who seeks the benefit of the Statute, or by those under whom he claims title. Although it is found that Buice was in possession of the premises, and that he conveyed to Crawbuck in July, 1803, it is not found when the latter entered under that conveyance; neither is it found that he held adversely to the claim of the devisee, or that the possession was continued for the term of twenty years before the devisee entered under his writ of possession. If the facts of the case were sufficient to authorize the jury to find that Crawbuck entered at the date of his deed, under a claim of title in himself, and that he and his tenants or assigns continued to hold the premises adversely for the term of twenty years, the special verdict should have been drawn up and settled in such a manner as to make it appear upon the record that the jury found the fact of such entry and adverse holding. Where a case for the opinion of the court is turned into a special verdict, every fact which the court or the jury were authorized to find from the evidence stated in the case, and which if found by the jury in a special verdict would go to support the judgment of the court, should be stated in the special verdict as having been thus found by the jury.

It was not necessary for the jury to find that the money which was secured to be paid by the mortgage was not in fact paid. If the defendant wished to defeat the title of the lessors of the plaintiff by the fact of the payment of the mortgage money, he should have established that fact by proof. It was sufficient for the jury to find the execution of the mortgage; and as the time for the payment of the money was past, the mortgagees were entitled to enter. The payment of the mortgage money cannot be presumed against the lessor of the plaintiff, if that fact is not found by the verdict. It cannot be necessary for the jury to find the negative of a fact, which fact is not to be presumed, except it be found by the verdict. When the existence of a debt is once established, the legal presumption is that it remains due, until such presumption is rebutted, by lapse of time, or by proof of payment. I apprehend, therefore, that this judgment cannot be sustained, unless it shall appear upon examination of the law on the subject that the deed of July, 1799, was a valid conveyance, as to the lot in ques-

tion, under the Statute of Uses. I shall therefore proceed to examine that question.

The two principal objections to this deed as a conveyance under the Statute of Uses are, that it attempts to convey a freehold *in futuro*, without any particular estate to support it as a remainder, and that there is *no sufficient consideration* in the deed to constitute a valid bargain and sale. If I am right in supposing that as to this lot it is a conveyance for the life of the grantor, reserving rent, with a remainder in fee without rent, the question whether a freehold *in futuro* can be conveyed by a bargain and sale, cannot arise here; but as other members of the court may have arrived at a different conclusion as to the construction of the deed, I shall proceed to examine this question, which was so fully argued by the counsel. It is admitted that a future estate may be created under the Statute of Uses, by virtue of a covenant to stand seised to the use of the grantee, founded upon a consideration of blood or marriage; but it is contended that such an estate cannot be conveyed by virtue of a bargain and sale, in which there is only a pecuniary consideration. For the purpose of testing the correctness of this supposed distinction, it may be necessary to examine the nature of each species of conveyance as a trust in equity previous to the Statute of Uses, and the effect of the Statute upon each, as a conveyance of the legal estate. The learned and able commentator on American law has so fully explained the nature of equitable uses previous to the passing of the Statute, 27 Hen. 8, *c.* 10, that it is unnecessary to refer to any of the English writers on that subject. Where the use was created by a common law conveyance, or the feoffment of a third person, operating by an actual transmutation or change of possession, as by livery of seisin, no consideration was necessary to support the use, but the feoffee holding the legal title as a mere naked trustee, held it charged with such uses as the feoffor had thought proper to direct. As the whole legal estate passed immediately to the feoffee to uses, there could be no objection that the use was to take effect *in futuro*, and there was a resulting use in the mean time to the original owner of the land. In this way the owner of the freehold estate was enabled, in equity, to create all those various species of estates which may now be created by will, under the name of executory devises. Another mode, however, of creating equitable uses, was by a simple covenant or agreement on the part of the owner of the legal estate to hold the same to such present, contingent or future uses as were specified in the contract creating the use. In this case, as the whole legal estate remained in the former owner, a court of equity would not lend its aid to enforce a mere voluntary agreement to give that estate or any part thereof to another; and the use, therefore, would not vest in the *cestui que use*, unless the agreement by which it was created was founded either upon a pecuniary consideration or upon a natural consideration of blood or marriage. The first was called a bargain and sale, as it was in fact an agreement to sell the use, however small the consideration might be;

but as the use, founded upon the consideration of blood and marriage alone, could not properly be called a sale, it received the technical name of a covenant to stand seised, which name was only used to distinguish it from a bargain and sale. This distinction, under the Statute of Enrolments, afterwards became very important, although the bargain and sale, previous to the Statute of Uses, was in fact nothing but a covenant to stand seised to the use of the bargainee. It will be seen from this examination of uses at the common law that there could not be any good reason why the same springing, contingent or future uses might not be created by a bargain and sale founded upon a valuable consideration, as were allowed to be raised by the less meritorious consideration of blood or marriage; and there was not in fact at the time of the passing of the Statute of Uses any such distinction as is contended for in this case. The effect of that Statute was to transfer the legal title to the use; what before was an equitable seisin of the use became an actual title to a similar interest in the land itself; and in all subsequent conveyances, which conveyances if that Statute had not been passed would merely have transferred an interest in the use, the actual interest in the land itself, to the same extent, was transferred to the *cestui que use*. The Statute of Enrolments, however, which was passed at the same session with the Statute of Uses, made a very important distinction between the conveyance of a use by bargain and sale and the creation of a similar use founded upon the consideration of blood or marriage; as the one was required to be enrolled and the other not. By the Statute of Enrolments, 27 Hen. 8, *c.* 16, it was enacted that "no manors, lands, tenements, or other hereditaments should pass, alter or change from one to another, whereby *any estate of inheritance or freehold* should be made or take effect in any person, or any use thereof be made, *by reason only of any bargain or sale thereof*, except the same bargain and sale be made by writing, indented, sealed and enrolled in one of the King's courts of record," &c., within six months. This Statute being limited in its terms to conveyances which could only operate as bargains and sales, it did not require the enrolment of a conveyance which could operate in any other way, although it might have operated as a bargain and sale if it had been duly enrolled. It did not extend to a conveyance which could operate at common law, either as a feoffment, or as a release of a reversion to the tenant in possession; although there might be a sufficient consideration expressed in such feoffment to constitute a good bargain and sale of the legal estate under the Statute of Uses. Neither did it extend to a deed which operated as a technical covenant to stand seised, by reason of a consideration of blood or marriage only; or to a conveyance which was both a bargain and sale and a covenant to stand seised, by reason of a double consideration. And as the Statute did not reach mere estates for years, it only requiring bargains and sales of freehold estates and of estates of inheritance to be recorded, a species of conveyance was very soon devised, by which the Statute was evaded in almost every possible case.

By the common law, if a tenant was in the actual possession of the land under a lease for years, or under a valid conveyance of any other estate in the premises, the owner of the reversion might release to him the whole of his interest in the premises or any lesser interest therein, provided the new interest which was thus released or conveyed took effect in possession immediately, or upon the termination of the particular estate which the tenant previously had in the land. The mode of conveying the estate was, therefore, by a lease of the estate for a term of years, which was made to operate under the Statute of Uses so as to be equivalent to an actual possession of the land under a lease at common law, and the lessee was thereupon without any actual entry or livery of seisin in a situation to receive a release. This release conveyed to him the freehold by a common law conveyance, which therefore need not be enrolled. Here, however, a difficulty sometimes occurred which has probably given rise to the supposition that a future interest in real estate could not be conveyed by a bargain and sale, although it might be transferred by a conveyance which could operate as a technical covenant to stand seised. The lease and release having become the common mode of conveyance in England, attempts were sometimes made, by unskilful conveyancers, to create a future estate out of the seisin of the vendor, by this mode of conveyance. As the release usually contained a pecuniary consideration, it would operate as a bargain and sale of the future estate if duly enrolled, although it could not operate as a release to convey such an estate at common law. But as the form of enrolment had not been complied with in the particular case, the conveyance was void, unless it could be made to operate as a technical covenant to stand seised, by reason of a consideration of blood or marriage, in which case it was valid without enrolment. The courts therefore became very astute in finding out a proper consideration to support the informal conveyance as a covenant to stand seised. And they have gone so far as to permit the introduction of parol proof to show a consideration of blood or marriage to support a conveyance not enrolled, although no other than a pecuniary consideration appeared on the face of the deed. See *Doe* v. *Sherlock and Fox*, Smith's Rep. 79. I have not been able to find any case in which it has been holden that a bargain and sale enrolled, and founded upon a proper consideration, was not sufficient to pass a freehold *in futuro*, although some of the judges in this country, where the Statute of Enrolment was not in operation, seem to have struggled to support conveyances of that description as covenants to stand seised, where there could be no doubt as to their being valid as bargains and sales, if they could be permitted to operate in that manner. Chief Justice Parsons, in *Wallis* v. *Wallis*, 4 Mass. R. 136, appears to take it for granted that the conveyance in that case, although founded upon a pecuniary consideration, could not operate as a bargain and sale of a future interest, and that it was necessary to support it as a covenant to stand seised, upon the fact of relationship proved *dehors* the deed, although there was no pretence

there that the relationship constituted any part of the actual consideration for the conveyance; and in *Welsh* v. *Foster*, 12 Mass. R. 96, Jackson, Justice, says in express terms that a freehold to commence *in futuro* cannot be conveyed by bargain and sale. The law has been understood otherwise in this State, although I am not aware that the question has been considered as perfectly settled. In *Jackson* v. *Dunsbagh*, 1 Johns. Cas. 94, Lewis, Justice, held a conveyance of a freehold *in futuro*, founded upon a pecuniary consideration only, to be valid. It is true, he says it is a covenant to stand seised, which it is in fact, although, in that case, taking the first deed by itself, it was nothing but a bargain and sale. Lansing, Ch. J., by connecting the two deeds together, supported the conveyance as a covenant to stand seised, founded upon the consideration of blood, but without expressing any opinion of the effect of the first deed, which was a mere bargain and sale; and in *Jackson* v. *Swart*, 20 Johns. R. 87, Spencer, Ch. J., seems to consider the law as settled, that a deed of bargain and sale, founded upon a pecuniary consideration only, was effectual to pass an estate *in futuro*. In the case of *Roe* v. *Tranmer*, 2 Wils. R. 75, 2 Lord Kenyon's R. 239, s. c., the conveyance was by lease and release, and as nothing is said of any enrolment, it is very evident none had taken place. The release, therefore, although it might have been good as a bargain and sale if enrolled, could only take effect as a common law conveyance, or as a covenant to stand seised, founded on the additional consideration of blood. The court then would of course only consider those two questions, without expressing any opinion as to its effect as a bargain and sale, if it had been duly enrolled. So in *Doe* v. *Sherlock* the lease purported to be a conveyance of a freehold interest *in futuro*. It could not operate as a conveyance by lease and release, because there was no lease for a term of years to support it. It was not enrolled, and therefore could not operate as a bargain and sale, although there was a sufficient consideration; and it could not operate as a feoffment, because there could be no livery of seisin presumed, and Bushe, Ch. J., held that it could not operate as a covenant to stand seised, although the relationship was proved, because there was no evidence to show that such relationship formed any part of the actual consideration of the conveyance.

Although there does not appear to be any express adjudication on this point, I find that most, if not all of the elementary writers take it for granted that a freehold *in futuro* may be created by a bargain and sale operating under the Statute of Uses. Barnes lays it down as a general rule that a freehold may be created to commence *in futuro* by a limitation to a use under a common law conveyance, or under any of the conveyances which have grown out of the Statute of Uses. Barnes on Real Prop. 246. Burton says the only essential difference between a covenant to stand seised to uses and a bargain and sale, setting aside the external formalities required to give validity to the latter, that is, the enrolment thereof, is the nature of the consideration; and hence the deed may operate for the benefit of the different parties, both as a

bargain and sale and a covenant to stand seised. Burton on Real Prop. 45, pl. 145. Cornish also takes it for granted that there is no difference between a bargain and sale enrolled, and a covenant to stand seised, in conveying a future freehold under the Statute of Uses; hence he concludes that a grant of lands generally by either of these modes of conveyance, with an *habendum* limiting a freehold to commence *in futuro*, will be valid to convey such estate, although it could not be thus limited by any common law conveyance. Cornish on Purch. Deeds, 35. Preston, too, lays it down as a general principle that conveyances operating under the Statute may create a freehold to commence *in futuro*, although no such estate could be limited in a conveyance which could only operate by the common law; and he makes no distinction between a covenant to stand seised and a bargain and sale duly enrolled, or any other conveyance by which an estate may be granted under the Statute of Uses. Chancellor Kent also says in express terms that a person may covenant to stand seised, or bargain and sell, to the use of another at a future day. 4 Kent's Comm. 2d ed. 298. As the Statute of Enrolments was never in force in this State, I have no doubt that at the date of the deed in question, a future freehold might be created by this conveyance operating as a bargain and sale merely, provided it was founded upon a sufficient consideration to raise a use.

The only remaining question to be considered is, whether there is any sufficient consideration to raise a use appearing upon the face of this deed, which is found by the jury to have been executed and delivered to Buice. [The Chancellor held that a consideration sufficient to raise a use appeared. This part of the opinion is omitted.][1]

The court being unanimously of opinion that the judgment of the Supreme Court ought to be affirmed, it was accordingly *affirmed*.[2]

[1] The opinion of Mr. Tracy, concurring with the Chancellor, is omitted.

[2] "The principle then seems to be, that a man may convey his land by a covenant to stand seised thereof to the use of another, either for certain good considerations, or for a valuable consideration; but in the latter case the conveyance, being in effect a bargain and sale, must have all the other requisites and qualities of a bargain and sale. One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use; from which it follows that a freehold, to commence *in futuro*, cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another, until the future freehold should vest." — *Per* Jackson, J., in *Welsh* v. *Foster*, 12 Mass. 93, 96 (1815).

Cf. *Wyman* v. *Brown*, 50 Me. 139, 150–159 (1863); Gray, Perpetuities, §§ 56, 57.

Note. — On the question whether by bargain and sale a use can be raised to a person not *in esse*, see Gray, Perpetuities, §§ 61–64.

See as to legislation in the United States allowing freeholds to be created *in futuro*, Id. §§ 67, 68; Stimson, Amer. Stats. § 1421.

CHAPTER V.

FUTURE INTERESTS IN PERSONAL ESTATE.

NOTE.— The law as to executory bequests of personalty being in many points identical with the law as to executory devises of land, it seems most convenient to consider here the creation of future interests in personalty ; and in the subsequent chapters to deal with interests in both real and personal estate.

FITZ-JAMES'S CASE.

COMMON PLEAS. 1565.

[*Reported Owen*, 33.]

NOTE by Dyer, that the Lord Fitz-James, late Lord Chief Justice of England, did devise his land to Nicholas Fitz-James in tail, with divers remainders over, and in the same devise he devised divers jewels and pieces of plate, viz., the use of them to the said Nicholas Fitz-James and the heirs males of his body. In this case it was the opinion of the court that the said Nicholas had no property in the said plate, but only the use and occupation. And the same law where the devise was that his wife should inhabit in one of his houses which he had for term of years, during her life, because the wife takes no interest in the term, but only an occupation and usage, out of which the executors cannot eject her during her life, but WALSH held the contrary.[1]

MANNING'S CASE.

COMMON PLEAS. 1609.

[*Reported* 8 *Co.* 94 *b.*]

IN debt for 200 marks by William Clark plaintiff, and Matthew Manning administrator of Edward Manning deceased, upon *plene administravit* pleaded, the jury gave a special verdict to the effect following, which plea began Mich. 4 *Jacobi Rot.* 1829. Edward Manning the intestate, *anno* 30 Eliz., was possessed of the moiety of a mill in Clifton in the county of Oxford, for the term of fifty years, of the clear yearly value of £40. and afterwards the said Edward Manning, 30 Eliz., made his will in writing, and thereby devised his indenture and lease of

[1] See 37 Hen. VI. 30 (1459); Gray, Perpetuities, § 80.

the farm and mill in Clifton, and all the years therein to come to Matthew Manning after the death of Mary Manning my wife (which farm and mill my will is, that Mary Manning my wife shall enjoy during her life) conditionally, that the said Matthew shall not demise, sell, or give the said lease, but to leave it wholly to John his son, &c. "In the mean time my will and meaning is, that Mary Manning my wife shall have the use and occupation both of the farm and mill, &c. during her natural life: yielding and paying therefore yearly to the said Matthew Manning, &c. during her natural life £7 at the feasts of St. Michael the Archangel, and the Annunciation of our Lady," and made Mary his wife sole executrix, and died; Mary took upon her the charge of the will, and had not sufficient to pay the debts of the said Edward Manning above the said term; but she entered into the said farm and mill, and paid to Matthew Manning the yearly sum of £7 according to the said will; and said, that if she died, the said Matthew Manning should have the farm and mill aforesaid; and afterwards the said Mary, sixteen years after the death of her husband, died intestate, after whose death the said Matthew Manning entered into the said farm and mill, and was thereof possessed *prout lex postulat;* and afterwards administration of the goods of the said Edward by the said Mary not administered was committed to the said Matthew, and that none of the profits of the said farm and mill, which accrued in the life of the said Mary came to the hands of the said Matthew besides the said £7 yearly as aforesaid. And the doubt of the jury was, if the residue of the said term in the said farm and mill should be assets in the hands of the said Matthew. But I conceived on the trial of the issue at Guildhall in London, that the devise to Matthew was good, and that there was sufficient assent to the legacy, by the said payment of the rent of £7. But yet upon the motion of the plaintiff's counsel, I was contented that the whole special matter should be found as is aforesaid. And the case was argued at the bar, and at divers several days debated at the bench, and *prima facie* WALMSLEY, JUSTICE, conceived, that the devise to Matthew Manning after the death of the wife was void, for the wife having it devised to her during her life, she had the whole term, and the devisor could not devise the possibility over no more than a man can do by grant in his life; for that which the testator cannot by no advice of counsel in his life, the testator, who is intended to be *inops consilii*, shall not do by his will; but by grant in his life he could not grant the land unto the wife for her life, the remainder over to another, for by the grant the wife had the whole term at least if she so long lived, and a possibility cannot be limited by way of remainder; and although the later opinions in the case (where a man possessed of a lease for years devises it to one for life, the remainder to another) have been that the remainder was good, yet he said that the old opinion, which hath more reason, as he conceived, was, that the remainder in such case was void, 28 H. 7, 7 Dyer, *Baldwin* and *Shelley*, that the remainder is void. ENGLEFIELD contrary, 6 E.

6, 74, *acc.* by *Hales* and *Montague*, 2 E. 6, tit. Devise, Brook, 13. that the remainder is void, for the devise of a chattel for one hour is good forever. But COKE, CHIEF JUSTICE, WARBURTON, DANIEL, and FOSTER contrary, that the devise was good to Matthew Manning; and five points were by them resolved: 1. That Matthew Manning took it not by way of remainder, but by way of an executory devise, and one may devise an estate by his last will in such manner as he cannot do by any grant or conveyance in his life, as if a man is seised of lands in fee held in socage, and devises that if A. pays such a sum to his executors, that he shall have the land to him and his heirs, or in tail, or for life, &c. and dies, and afterwards A. pays the money, he shall have the land by this executory devise, and yet he could not have it by any grant or conveyance executory at the common law; but it stands well with the nature of a devise; so in the case at bar when the wife dies it shall vest in Matthew Manning as by an executory devise, as if he had devised that after a son has paid such a sum to his executors, that he shall have his term; or that after the death of A. that B. shall have the term; or, that after his son shall return from beyond the seas, or that A. dies, that he shall have it. in all these cases and other like, upon the condition or contingent performed, the devise is good, and in the mean time the testator may dispose of it; and therefore in judgment of law, *ut res magis valeat*. the executory devise shall precede, and the disposition of the lease, till the contingent happen, shall be subsequent, as in the case at bar it was, and so all shall well stand together; for when he made the executory devise, he had a lawful power, and might well make it: and afterwards in the same will he had lawful power, and might well devise the lease till the contingent happened, and therefore it is as much as if the testator had devised, that if his wife died within the term, that then Matthew Manning should have the residue of the term; and farther devised it to his wife for her life. 2. The case is more strong, because this devise is but of a chattel, whereof no *præcipe* lies; and which may vest and revest at the pleasure of the devisor, without any prejudice to any. And therefore if a man makes a lease for years, on condition that if he do not such a thing, the lease shall be void, and afterwards he grants the reversion over, the condition is broken, the grantee shall take benefit of this condition by the common law, for the lease is thereby absolutely void: but in such case if the lease had been for life, with such condition, the grantee should not take the benefit of the breach of the condition; for a freehold (of which a *præcipe* lies) cannot so easily cease; but is voidable by entry after the condition broken, which cannot by the common law be transferred to a stranger; and therewith agrees 11 H. 7, 17 a, and Br. Conditions, 245, 2 *Mariæ*, by Bromley the same difference. 3. There is no difference when one devises his term for life, the remainder over; and when a man devises the land, or his lease, or farm, or the use or occupation, or profits of his land; for in a will the intent and meaning of the devisor is to be

observed, and the law will make construction of the words to satisfy his intent, and to put them into such order and course that his will shall take effect. And always the intention of the devisor expressed in his will is the best expositor, director, and disposer, of his words; and when a man devises his lease to one for life, it is as much as to say, he shall have so many of the years as he shall live, and that if he dies within the term that another shall have it for the residue of the years; and although at the beginning it be uncertain how many years he shall live, yet when he dies it is certain how many years he has lived, and how many years the other shall have it, and so by a subsequent act all is made certain. 4. That after the executor has assented to the first devise, it lies not in the power of the first devisee to bar him who has the future devise, for he cannot transfer more to another than he has himself. 5. In many cases a man by his will may create an interest, which by grant or conveyance at the common law he cannot create in his life; and therefore when Sir William Cordell, Master of the Rolls, devised his manor of Melford, &c., in the county of Suffolk, to his executors for the payment of his debts, and until his debts should be paid, the remainder to Edward his brother, &c., and made George Carey and others his executors, and died, and after his death the debts were paid; and his wife demanded dower, and one question amongst others was moved, what interest or estate the executors had? for if they had a freehold, then the wife should not have dower and if they had but a chattel determinable upon the payment of the debts, then she should be endowed; and this case was referred to Anderson, Chief Justice of the Common Pleas, and Francis Gawdie, Justice of the King's Bench, before whom the case was at several days debated, Pasch. 36 Eliz., and I was of counsel with the executors; and it was resolved by them that the executors had but a chattel, and no freehold; for if they should have a freehold for their lives, then their estate would determine by their death, and not go to the executors of the executors, and so the debts would remain unpaid; but the law adjudges it a particular interest in the land, which shall go to the executors of the executors, as assets for payment of his debts. But if such estate be made by grant, or conveyance at the common law, the law will adjudge it an estate of freehold, and so a more favorable interpretation is made of a will in point of interest or estate to satisfy the will of the dead for the payment of his debts, than of a grant or conveyance in his life; which he may enlarge, or make other provision at his pleasure. And so was it resolved in the beginning of the reign of Queen Elizabeth that where a man had issue a daughter, and devised his lands to his executors for the payment of his debts, and until his debts were paid, and made his executors and died, the executors entered, the daughter married, and had issue and died, and after the debts were paid, it was resolved in the case of one Gnavarra that he should be tenant by the curtesy. *Vide* 3 H. 7, 13. 27 H. 8, 5 21 Ass. p. 8. 14 H. 8, 13.

Note, reader, it has been of late often adjudged according to these resolutions, *sc.*, in *Weldon's Case*, 2 Brownl. 309, Plowd. Com., *in Communi Banco*. In *Paramour's Case*, 2 Brownl. 309, Plowd. Com., in the King's Bench, Mich. 26 and 27 Eliz. in a writ of error in the King's Bench, on a judgment given in the Common Pleas, the case was such: Thomas Amner brought an *ejectione firmæ* against Nicholas Loddington on a demise made by Alice Fulleshurst for seven years of certain houses in London, and on not guilty pleaded, the jury gave a special verdict. Hugh Weldon was seised of the said houses in fee, and 24 H. 8, demised them to Thomas Pierpoint for ninety-nine years, who by his will in writing 1544, devised his said lease in these words: "I devise my lease to my wife during her life, and after her death I will it go to her children unpreferred," and made his wife his executrix, and died. His wife entered and was possessed *ratione boni et legationis*, and married with Sir Thomas Fulleshurst, and afterwards 2 and 3 Phil. and Mar., Bestwick recovered against Sir Thomas £140 debt in the Common Pleas, and by force of a *fieri facias* directed to Altham and Mallory, sheriffs of London, the said term was sold to Nicholas Loddington, the now defendant, and afterwards the judgment against the said Sir Thomas Fulleshurst was reversed in a writ of error in the King's Bench, *et quod ad omnia quæ amisitratione judicipræd, restituatur*, and afterwards Alice the wife and executrix died. Alice Fulleshurst being then the only daughter who was unpreferred, entered and made the lease to the plaintiff Thomas Amner. And this case was often argued at bar by the serjeants in the Common Pleas, and at last by the judges; and in this case three points by them were resolved: 1. That the said executory devise of the lease after the death of the wife to the daughter unpreferred, was good; and there is no difference when the term, or lease, or houses, and when the use or occupation, &c., is devised, and that in all these cases the executory devise is good. 2. That the sale either by Alice the wife, or by the sheriff on the *fieri facias*, after the wife was possessed as legatee, should not destroy the executory devise, although the person to whom the executory devise was made was then uncertain, as long as Alice the wife lived; for the said Alice the daughter might have been preferred in her life, and then she should take nothing, so that such executory devise which has dependence on the first devise may be made to a person uncertain, and this possibility cannot be defeated by any sale made by the first devisee, &c. 3. That the sale by the sheriff by force of the *fieri facias* should stand, although the judgment was after reversed, and the plaintiff in the writ of error restored to the value, for the sheriff who made the sale, had lawful authority to sell, and by the sale the vendee had an absolute property in the term during the life of Alice the wife; and although the judgment, which was the warrant of the *fieri facias*, be afterwards reversed, yet the sale, which was a collateral act done by the sheriff, by force of the *fieri facias*, shall not be avoided; for the judgment was that the plaintiff should recover

his debt, and the *fieri facias* is to levy it of the defendant's goods and chattels, by force of which the sheriff sold the term which the defendant had in the right of his wife, as he well might, and the vendee paid money to the value of it. And if the sale of the term should be avoided, the vendee would lose his term, and his money too, and thereupon great inconvenience would follow that none would buy of the sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done. And according to these resolutions judgment was given in the Common Pleas for the plaintiff, and in the King's Bench upon a writ of error the case was often argued at the bar before Sir Christopher Wray, and the court there, and at length the judgment was affirmed, and so the said three points were adjudged by both courts: and by these latter judgments you will better understand the law in the books, in which there are variety of opinions. 37 H. 6, 30. 33 H. 8. Br. tit. Chattels 33. 2 E. 6, tit. Devise, Br. 13. 28 H. 8, Dyer 277. Plow. Com. in *Weldon's* and *Paramour's Case*, &c. *Quia judicia posteriora sunt in lege fortiora.*[1]

COTTON *v.* HEATH.

King's Bench. 1638.

[*Reported* 1 *Roll. Ab.* 612, *pl.* 3.]

If A., possessed of a term for years, devises it to B., his wife, for eighteen years, and then to C., his eldest son, for life, and then to the eldest issue male of C. for life, although C. has no issue male at the time of the devise and death of the devisor, yet if he has issue male before his death, such issue male will have it as an executory devise, because, although it be a contingency upon a contingency, and the issue not *in esse* at the time of the devise, yet as it is limited to him but for life, it is good, and all one with *Manning's Case.* On a reference out of Chancery to the Justices Jones, Croke, and Berkeley, by them resolved without question.

ANONYMOUS.

Common Pleas. 1641.

[*Reported March*, 106, *pl.* 183.]

A prohibition was prayed unto the Council of the Marches of Wales, and the case was thus: A man being possessed of certain goods, devised them by his will unto his wife for her life, and after her decease

[1] *Lampet's Case*, 10 Co. 46 b (1612), *accord.* See Gray, Perpetuities, §§ 148–152.

to J. S., and died. J. S. in the life of the wife did commence suit in the court of equity, there to secure his interest in remainder, and thereupon this prohibition was prayed. And the justices, viz., BANKS, Chief Justice, CRAWLEY, FOSTER (REEVE being absent), upon consideration of the point before them, did grant a prohibition, and the reason was because the devise in the remainder of goods was void, and therefore no remedy in equity, for *æquitas sequitur legem*. And the Chief Justice took the difference, as is in 37 H. 6, 30, Br. Devise 13, and *Com. Welkden and Elkington's Case*, betwixt the devise of the use and occupation of goods, and the devise of goods themselves. For where the goods themselves are devised, there can be no remainder over; otherwise, where the use or occupation only is devised. It is true that heirlooms shall descend, but that is by custom and continuance of them; and also it is true that the devise of the use and occupation of land is a devise of the land itself, but not so in case of goods, for one may have the occupation of the goods, and another the interest; and so it is where a man pawns goods and the like. For which cause the court all agreed that a prohibition should be awarded.

VACHEL *v.* VACHEL.

CHANCERY. 1669.

[*Reported* 1 *Ch. Cas.* 129.]

TANFIELD VACHEL, by his last will in writing, deviseth to the effect following (viz.), I give the use of all my several paintings, and books of print, my colored collection of medals in gold, silver, and brass; all my rare turnings of ivory and guayacum, with my press of books, and chest of drawers with the perspective in it, to my dearly beloved wife (the defendant, Rebeccah Vachel) during the term of her natural life. And my will is, that if she be with child of a son, that then after her decease the same paintings, books of print, &c., shall be left, remain, and come to the same son. But if my wife be not with child of a son, or if the same son shall die without issue male of his body, then my will is, that all the said paintings, books of print, &c., after the decease of my said wife, and the death of such son as my wife is now with child of, shall come and remain to the use of Thomas Vachel (the father of the plaintiff), of which my will is that the said Thomas Vachel shall have the use only during his life, and that he leave them to my kinsman Thomas Vachel, his son (the plaintiff), and that he shall, as far as in him lies, so dispose thereof to him that shall by God's blessing next succeed himself in my manors and lands in the county of Berks, that they remain as an heirloom, and go and remain to such person and persons as shall inherit my said manors and lands, who I desire may prove lovers of learning, ingenuity, and arts. Which clause the defendants

insisted to be revoked by a codicil, and the matter as to that point having been fully heard, and his Lordship [Sir Orlando Bridgeman] having had the opinion of civilians therein, did on the first of May last declare his judgment to be, that the use of the aforesaid rarities was well settled by the will of the said testator upon the plaintiff Thomas Vachel after the death of the said defendant Rebeccah Vachel, and not revoked. But the defendant's counsel then insisting, that though they were admitted to be agreeable to the civil law, yet the very limitation in the clause of the will of the rarities to the plaintiff was void by the common law. His Lordship, for the defendant's farther satisfaction, declared he would have the opinion of the lords the judges therein, upon that single point of the limitation of the rarities, whether the same were a good or void limitation. And the cause now standing in the paper for a determination in that point, his Lordship declared he had advised with the lords the judges, and now, assisted with Mr. Justice Rainsford and Mr. Justice Wyld, upon deliberate consideration had of the clause aforesaid, in the will, whereby the use of the rarities are devised to the plaintiff after the death of the said Rebeccah Vachel; and forasmuch as the said Thomas Vachel the plaintiff's father died in the lifetime of the said Tanfield, and the defendant Rebeccah being not with child of a son, so as the contingencies upon which the limitation was made never happened, his Lordship with the lords the judges were all clear of opinion, that the devise to the said Thomas Vachel the son was an absolute devise, and good in law, and that the defendant Rebeccah Vachel ought only to have the use of the said rarities during her life only, and the plaintiff is to have the same after her death, according to the said will; and both order and decree the same accordingly, and that the defendant be examined upon interrogatories for the discovery of the particulars of the rarities and matters so devised, and that an inventory of the said rarities be made according to the said order of the first of May. And as touching security now prayed by the plaintiff's counsel, and other matters for final completing this decree, the court declared, that the same was not the proper business of this day, and they would not now determine the matter, but leave the plaintiff to move this court therein, and then such farther order shall be made as shall be just.

HIDE *v.* PARRAT.

Chancery. 1696.

[*Reported* 2 *Vern.* 331.]

The plaintiff, Hide's father, devised the goods in his house at Hoddesden in these words, "I give and bequeath unto my wife all my household goods that are in my dwelling-house at Hoddesden, in the parish of

Much-Amwell, during her natural life: and after her decease I give and bequeath my said household goods unto my son Joseph forever." The question was, whether the devise over of these personal chattels (as the will was worded) was good or not.

It was insisted by the defendant's counsel that the devise over was void, and relied on the difference taken in the books, where the thing itself was devised, as in this case the goods were devised, the devise over was void; but where only the use of them is devised to one for life, it is otherwise; and for that purpose cited the case 37 H. 6, 30, Brook's Abridgment, tit. Devise, Plowden's Commentaries, 521 b, Owen's Reports, 33, and March's Reports, 106, where a prohibition was granted out of the Court of Common Pleas to the Court of the Marches of Wales for proceeding for the devise over of a personal chattel.

For the plaintiff it was answered that all these authorities cited were built upon the case 37 H. 6, but of latter times it had been otherwise resolved upon great debate, and instanced in the case of *Lord Ferrars, Hart and Say*, and *Vachel and Vachel*, 1 Ca. in Ch. 129, &c., and that in the present case, the same arising upon a will, a construction (as far as the law will admit) is to be made, that the intention of the testator may take place. And therefore if a man possessed of a term for years grants the term to one for life, the remainder over, the remainder over is void; but in the case of a will, or of an assignment by way of trust, there the remainder over is good.

The Lord Keeper [Sir John Somers] held that the devise over was good, for as to the personal chattels, the civil and canon law is to be considered, and there the rule is, where personal chattels are devised for a limited time, it shall be intended the use of them only, and not the devise of the thing itself, and therefore allowed the remainder over to be good.[1]

WRIGHT *v.* CARTWRIGHT.

King's Bench. 1757.

[*Reported* 1 *Burr.* 282.]

On a case stated from the assizes.

Edmund Plowden, being seised in fee, demised on the 5th of October, 1676, by deed (viz. by indenture of lease between him and Elizabeth Cartwright, only), to the said Elizabeth Cartwright for 99 years, if she should so long live; and after her death, if she happen to die within the said term, or other end or determination of the said term, the

[1] s. c. 1 P. Wms. 1.

"J. S. deviseth £500 to his daughter, and if she die before thirty years of age unmarried, then to be divided between three; she does receive the money, and dies before that time. And resolved that the money should be divided, and her executor chargeable, as possessed in trust for the devisees in remainder." — *Anon.*, Freem. Ch. 137, pl. 172.

remainder *thereof* to Rowland Cartwright her eldest son (then under age), *for and during the residue* of the said TERM, from thence ensuing and fully to be complete and ended: yielding and paying, &c., and doing suit at a mill, &c.; with a penalty for every time that she *or* Rowland shall grind at another mill; and *paying a heriot* on the death of *either*. And it is covenanted that BOTH of them shall repair, &c., and the lessor on his part covenants that BOTH shall quietly enjoy, &c.

Elizabeth Cartwright entered, and was possessed; and died on the 4th of September, 1694. Whereupon Rowland Cartwright entered, and was possessed, till the said Rowland died; which happened on the 5th November, 1753.

The lessor of the plaintiff is heir-at-law to Edmund Plowden, the lessor. The defendant is the personal representative of Rowland Cartwright.

The question is "whether the term exists;" *i. e.*, whether it *continues* BEYOND the *life of Elizabeth Cartwright*. For *if* the TERM does *not* continue beyond the life of E. C., then the lessor of the plaintiff has a title to recover. *If* it *does*, then the defendant hath a title, as representative of Rowland Cartwright.

Mr. Aston, for the plaintiff, cited Sheppard's Touchstone of Common Assurances, 274; where it is said, that if a man makes a lease to A. for 80 years if he so long live; and if he die within the said term or alien, that then his estate shall cease; and by the same deed the lessor farther lets to B. for so many years as shall then remain unexpired after, &c. for the residue of the said *term* of 80 years, if he shall so long live; in this case the lease to B. "during the residue of the TERM" is void: for after the death of A. the TERM is at an *end*. But if he say, "for and during the residue of the 80 YEARS," it is good.

Mr. Nares, for the defendant, was stopped by the court.

LORD MANSFIELD. The distinction just cited from Sheppard (which he takes from the *Rector of Chedington's Case*), makes no difference; *if* the word "TERM" may signify the *time*, as well as the interest: for *then* it becomes merely a question of construction, "*which* sense the word ought to be *understood* in."

So Anderson argued in *Green* v. *Edwards:* he said, "If the wife had been a party to the deed, *durante termino* should *not* be taken for the *interest*, but for the *time*." He said, "The word *term* cannot be taken to mean the *interest* which the husband had for 90 years." (For if it is *so* understood, by *his death* the whole would be determined; and the wife could have nothing, and therefore it could not be used in *this* sense. But the lessor, by the word "*term*," must mean the *time* of 90 years: and the word "*term*" signifies *as well the time or space of* 90 years, as the *interest*.) The other judges held the *limitation by way of remainder* to be *void*, from the *uncertainty of commencement:* and denied that the wife's being a party would have made any alteration.

The *old* cases held "that there could be *no remainder* or substitution *of a* TERM *after an estate for life*, by *deed* or *will*." It was a mere *possibility*. It was *void*, from the *uncertainty of commencement*. There was *no particular estate*. The gift of a term (like any other chattel) for an *hour*, was good *forever*.

The objections were subtle and artificial.

When *long and beneficial terms* came in use, the *convenience of families* required that they might be settled upon a child, *after the death* of a parent. Such limitations were soon allowed to be created by *will:* and the old objections were removed, by changing the name, from remainders, to EXECUTORY *devises*.

The *same reason* required that such limitations might be created by *deed;* as, for instance, marriage settlements, to answer the agreement of parties, and exigencies of families. Therefore, to get out of the literal authority of old cases, an ingenious distinction was invented: a remainder might be limited for the residue of the *years;* but *not* for the residue of the *term*.

Now in *this* case, upon the true construction of the lease, I am clearly of opinion "that the land is demised to the son *for so many of* 99 *years* as should be unexpired at the death of his mother."

There are many maxims of law, that deeds, especially such "as execute mutual agreements for valuable consideration, should be construed *liberally*, *ut res magis valeat*, according to the *intent:*" which ought always to prevail, unless it be contrary to law.

The passage from Coke Littleton 45, cited by Mr. Aston, defines the word "*term*," to signify, in understanding of law, "*not only the limits and limitations of time*, but also the estate and interest which passes for that time."

If in *this* lease the word be taken in the *latter* sense, the widow can only have it for so many of 99 years as she should live; and the son have NOTHING afterwards.

But it is manifest that an interest was understood to *continue after her death*, to be *enjoyed by her son*.

From the course of nature it could not be supposed that she would *outlive* the 99 years. Rowland is to *pay a penalty* for grinding at another mill. *He* is to *pay a heriot* on the death of his mother. *He* is to *repair*. The lessor covenants "that Rowland *shall quietly enjoy*," *i. e.* for so many years as should not be run at the death of his mother.

The *first* sense of the word makes everything consistent and effectual: the *second* sense destroys one half of the lease, as repugnant and contradictory to the other. There ought to be no doubt, therefore, in *which* sense the word should be understood.

Mr. Aston has laid no stress upon the only objection which weighed with Anderson, so long ago as the 33d of Elizabeth: viz. "That Rowland was *no party* to the lease:" and rightly. The reason *why* he was no party, appears from the lease: he was then an *infant*. The mother contracts, and procures this limitation *for him*. A grant may be made

to a person by a deed to which he is no party. Rowland *accepted*, and actually *enjoyed*, after his mother's death, from the 4th of September, 1694, to his own death, the 5th of November, 1753. The lease was so intelligible to every *unlearned* eye that nobody doubted of his title for 60 years.

Limitations of terms are *now* of general use. Their bounds are settled. The rules concerning them are certain and established. When they came to be allowed by will, or by declaration of trust, the *substantial reason* was the same for allowing them by *deed*. A strained construction should not be made to overturn the *lawful intent* of the parties. It was *lawful* to secure this lease for the benefit of the mother during her life, and afterwards by way of provision for her son. *All* the parties undoubtedly *intended* it. The covenant here, "that Rowland should enjoy from the death of his mother, for the residue of 99 years," is sufficiently certain; and might of itself amount to a lease.

MR. JUSTICE DENISON. This must be taken that she should hold it for so much of the term of *years* as she should live; and Rowland during the remainder.

The *intention* of the deed is obvious: and it certainly shows (upon the whole tenor of it) that the *intention* of the parties was "that BOTH should enjoy during the whole term and number of years." And if we *can* support the *intention*, by *any* construction, we will do it.

MR. JUSTICE FOSTER was clear that the INTENTION was that *both* should enjoy during the whole *term and number of years*: viz. Elizabeth for so long of it, as she should live; and Rowland during the remainder. All the circumstances show this: and the reserving a *heriot* upon the death of Rowland proves the *intention* to have been "that the *term* should *continue to Rowland after* the death of his mother." And the covenants all along run, "that Rowland shall quietly enjoy."

Therefore he concurred.

PER CUR. unanimously (MR. JUSTICE WILMOT absent).

RULE — That the *plaintiff be nonsuited.*

HOARE *v.* PARKER.

KING'S BENCH. 1788.

[*Reported* 2 *T. R.* 376.]

TROVER for plate by the plaintiffs, who claimed under a remainderman, against the defendant, to whom it was pawned by the tenant for life. Admiral Stewart by will gave his plate to trustees for the use of his wife *durante viduitate*, requiring her to sign an inventory, which she did at the time the plate was delivered into her possession. She afterwards pawned it with the defendant for a valuable consideration,

who had no notice of the settlement; and before the commencement of this action she died. A demand and refusal was proved. A special case was reserved before *Buller*, J., at the last sittings at Westminster, stating these facts; and the question was, Whether the defendant were bound to deliver up the plate without being paid the money he had advanced on it?

Baldwin, for the defendant, declared that he could not argue against so established a point.

Gibbs, for the plaintiff.

Per Curiam. This point is clearly established, and the law must remain as it is till the legislature think fit to provide that the possession of such chattels shall be a proof of ownership.

Postea to the plaintiffs.

ANONYMOUS.

North Carolina. 1802.

[*Reported* 2 *Haywood*, 161.]

Testator had devised a negro to his wife and *also* lands for life; and the executors of the testator sued for the negro.

Johnston, Judge. The words *and also* continue the clause, and the words *for life* refer to all that precedes. She had an interest for life in the negro as well as in the lands, and there remained a reversion which vested in the executors; and although the next of kin may be entitled to it, yet the executors must distribute it, and must recover in the first instance, in order to that distribution.

Judgment accordingly.[1]

TUCKER *v.* STEVENS.

Court of Chancery of South Carolina.

[*Reported* 4 *Desaus*, 532.]

Desaussure, C. The object of this bill is to have the benefit of a mortgage or pledge of a slave named Peter, made by Henry Stevens in his lifetime, to secure the repayment of a sum of money, to wit, $270, which Joseph Tucker loaned to him, together with interest.

The defendants admitted the loan of the money, and the pledge or mortgage of the slave in question; but they state, that they as executors had never claimed the negro as part of the estate of their deceased father and testator; and that the slave has always remained in the

[1] See Gray, Perpetuities, § 97. *State* v. *Savin*, 4 Harring. 56 *n.*, is *contra*.

possession of Elizabeth Stevens, the widow of the testator, who claims him under a deed from her brother, Thomas Davis deceased, dated the 24th of June, 1796, by which several negroes were given to her, and upon her decease, were to go to her children; and that her husband had no right to the said negro, nor power to mortgage him; and that the conplainant must have had notice of the claim of the said Elizabeth, before he loaned his money on that security, as it was notorious in the neighborhood.

A copy of the deed of the 24th June, 1796, under which the defendant claimed, was offered in evidence, and was, after some discussion, received by the court.

By that instrument it appeared, that Thomas Davis for and in consideration of the natural love and affection he bore his sister, Elizabeth Davis, and in consideration of five shillings, granted and sold to her and her heirs lawfully begotten, certain slaves named in the deed: and the said Elizabeth Davis agreed to hold the said slaves and their increase during her own life; and at her death, the said slaves were to return to the said Thomas Davis and his heirs, unless the said Elizabeth should leave an heir or heirs lawfully begotten of her body, in which case if such heir survived her, the said slaves and their increase should belong, after her death, to such surviving heirs, to be equally divided among them.

It was proved that the slave Peter was one of the increase of the said negroes: and it was also proved that the slaves under the deed were in the possession of Elizabeth Davis before her marriage with Henry Stevens; and several of the witnesses swore that it was known to them, and they believed in the neighborhood, that the slaves were entailed to Mrs. Stevens' children; but none of them could say whether this was known to Mr. Tucker, the complainant. Other witnesses who lived in the neighborhood, knew nothing of the limitation of the negroes to the children, under the deed, till recently. One of the witnesses was offered a mortgage of some of the negroes by Mrs. Stevens, if he would lend money to her husband; and he was present when the mortgage was made to Tucker: but nothing was stated to Tucker of the negroes being a separate estate of the wife.

The slaves included in the deed and their increase, were included in the appraisement of the husband, Mr. Stevens' estate, by the executors, who are the children of Mr. and Mrs. Stevens.

Mr. Stevens died, leaving alive his wife and several children, who are still living.

This case was argued beyond the value of the property in question. The deed was not very regularly drawn, but its intent cannot be mistaken, and the intent of the parties must be pursued in deeds as well as in wills, only that the court will not go so far in liberal construction to reach the intent in the former case, as in the latter. But the intent here is plain; the brother, Thomas Davis, meant to give his sister, Elizabeth Davis, and she agreed to accept and hold, a life estate

in certain slaves and their increase; and if she left issue of her body at her death, such issue should take the slaves; if not, they were to return to Thomas Davis.

The limitation, it was insisted by the complainant's counsel, was too remote and void; but upon a careful review of the deed, I do not think so. There is not a feature in the deed which gives the idea that any limitation was intended beyond the proper boundaries established by law. The limitation is to a person then living, for her life, and to the issue of her body who might survive her; and in case of no such surviving issue, the property was to return to her brother, the donor. The wife of Mr. Stevens then had a clear life estate in the slaves under the deed, and no more. By the marital rights, Mr. Stevens acquired an entire interest in the personal property of which his wife was possessed, and could dispose of the same to the extent of his interests; and he has pledged one of the slaves under the deed to pay a just debt.

But it was insisted, that it was a separate estate in the wife, in which the husband had no right, and over which he had no control.

There is, however, nothing in the deed which marks this property, as intended to be a separate estate in the wife: There are no express words in the deed which declare that it shall be free from the husband's control, and not liable to his debts; and there is nothing in the nature of the property whence the court could infer an intent that it should be to the separate use of the wife, as the case of a gift of jewels for the personal use of the wife would be; as in *Graham* v. *Londonderry*, 3 Atk. 393.

I admit, that if the court could see any grounds on which to place this property as a separate estate, the want of technical words, or the want of a trustee, would not prejudice the wife. The husband should be construed a trustee; and technical words are not necessary, as is stated by the Lord Chancellor in *Darby* and *Darby*, 3 Atkyns, 399. But this is a plain gift of personal property to the wife for her life before the coverture, to which the marital rights of the husband attached on the marriage taking place. The reports in the neighborhood as to this being a separate estate in the wife, were not brought home to the complainant Tucker; and if they had been, that would not have altered the rights of the parties. Neither can the appraisement of the negroes as the absolute property of the husband's estate, and not merely during the life of the wife, vary the rights of the party and take away the right of the children after the death of the mother: it was a mere mistake. If the law of Virginia differs from our own in any respect, it might have had an influence on this case, as the deed was executed there; but I am not aware of any difference on the points in question, and none was suggested at the bar.

It is therefore ordered and decreed that the slave named Peter, in the bill mentioned, be sold by the commissioner at public sale, for and during the life of Mrs. E. Stevens, the widow of the late Henry

Stevens, on a credit of six months from the day of sale; the purchaser to give bond and good security for the purchase-money, and for the return of the said slave Peter to the children of Mrs. Stevens at her decease. And it is further ordered that if the price which said negro may bring at such sale be not sufficient to pay the debt due to the complainant and the costs of suit, that it be referred to the commissioner to ascertain and report the balance of the debt and the assets of the estate of Henry Stevens, liable to this debt.

Costs to be paid by the defendants out of the estate of Henry Stevens.[1]

DUKE *v.* DYCHES.

South Carolina Court of Appeals. 1829.

[*Reported* 2 *Strob. Eq.* 353, *n.*]

Moses Duke, the plaintiff's testator, in his lifetime made a deed of gift of certain negro slaves to Esther Benson, his illegitimate daughter, now the wife of the defendant, reserving a life estate to himself. After his death the defendant took possession of the negroes. An action was brought for their recovery by the executors, and a nonsuit ordered on circuit, on the ground that the plaintiffs showed no title in themselves. The case was heard, on appeal from this order, at Columbia, December Sittings, 1829, and the following is the opinion of the Court of Appeals: —

Nott, J. Moses Duke, the plaintiff's testator, in his lifetime made a deed of gift of the negroes in question to Esther Benson, his illegitimate daughter, now the wife of the defendant, reserving a life estate to himself. After his death the defendant took possession of the negroes. The copy of the deed of gift is as follows: —

"To all to whom these presents shall come, I, Moses Duke, do send greeting. Know ye that I, the said Moses Duke, of Barnwell District, in the State of South Carolina, for and in consideration of the love, good will and affection which I have and do bear towards my loving daughter, Esther Benson, of the same place, have given and granted, and by these presents do freely give and grant, unto the said Esther Benson, her heirs, executors and administrators, one certain negro boy slave named Arthur, and one negro girl slave named Jane, to be and remain as her proper right and property after the death of the said Moses Duke, or at any time previous thereto, if the said Duke shall think fit to do so. But it is the true intent and meaning of the

[1] See Gray, Perpetuities, § 91. The law in North Carolina is held otherwise, Id. §§ 92–94. So in that State a grant by deed of a life interest in a chattel passes the absolute property, and there is no reversion. *Cullar* v. *Spiller*, 2 Haywood, 130 (1800). *Hunt* v. *Davis*, 3 Dev. & B. 42 (1838). Cf. *Higgenbotham* v. *Rucker*, 2 Call, 313 (1800); Gray, Perpetuities, § 97.

said Moses Duke that if the said Esther Benson shall die without lawful issue, then the said negroes, viz.: Arthur and Jane, shall go to the lawful heirs of the said Moses Duke, to be and become thereafter the rightful property of his said heirs, in as full and ample manner as if this present deed had never been made or given. And the said Esther Benson the said property shall and may hold, upon the terms and conditions above mentioned, as her proper goods and chattels, without any sort of reserve whatever. Witness my hand and seal this 4th day of August, in the year of our Lord one thousand eight hundred and four, and in the 29th year of American Independence.

MOSES DUKE. [L. S.]

Signed, sealed and delivered in the presence of
J. Hughes and Micajah Hughes."

And the only question now submitted to us is whether personal property can be limited over by deed to take effect after the termination of a life estate. 1 Fearn. 26; 1 Mad. Ch. 223. It was formerly held that no such limitation could be made, either by deed or will; but a gift for life, or even for a day, carried the whole estate. Fearn., *supra;* 1 Pr. Wms. 1, *Hyde* v. *Parrot et al.;* do. 500, *Tessin* v. *Tessin;* do. 651, *Upcal* v. *Halsy*. The first deviation from that rule was by way of distinction between the gift of the use of a thing, and a gift of the thing itself. Since those decisions the distinction between the use and the thing itself has been laid aside, and a gift of the chattel itself, for life, is considered as a gift of the use only. 1 Fearn. 241. But it is contended that those decisions apply only to executory bequests by will, or to trusts, and not to cases where the property is given immediately by deed. And I do not know that *such a limitation by deed has ever been held good in England;* neither do I recollect any modern decision where the contrary has been held. And it now remains for this court to decide whether that distinction, between deeds and wills, is still to be maintained, or whether it is now time to lay aside that distinction also, or rather whether any such distinction has ever prevailed in this State. And I would here remark that the *invasion of the common law principle, in England*, has not been by legislative authority, but by the courts alone. And if a gift by will for life conveys nothing but the use, why may not the same words in a deed have the same operation? If the courts have the power in one case to effect such a change, as being more consistent with reason and common-sense, and more consistent with the intention of the party, why may they not in the other? I am not, however, friendly to that kind of judicial legislation which authorizes judges to innovate upon an established rule of law because they think it is time that it should be changed. And if I found the current of decisions running against the principle which I am advocating, I should feel bound to go with them. But I have already remarked that it is a subject on which *the late English authorities are almost silent*, and on which I think I

shall be able to show that I am well supported by the decisions of our own courts. I mean, however, to confine my remarks exclusively to the species of property now under consideration. For although, by our law, slaves are considered as personal estate, yet we have, in various respects, made a distinction between that species of property and other personal chattels. The limitation over of a female slave has been held to carry with it a limitation over of the offspring born during the life estate, which is not the case with any other animal. The conversion of a female slave to the use of a person, renders the party liable for damages, to the amount of the value of the issue, born during the time of the possession, as well as the value of the mother, contrary to the rule in case of female brutes.

And in the case of *Geiger* v. *Brown* [2 Strob. Eq. 359 *n.*], decided at our last court, we held that a bequest of a female slave for life, without any limitation over, carried only a life estate, and that the slave and her issue, at the termination of the life estate, were unbequeathed assets in the hands of the legal representatives, for which the administrators might maintain an action. We have thus given to this kind of property attributes of realty which do not belong to other personal chattels. And to hold it not capable of limitation over after a life estate, would be inconsistent with the character which has been ascribed to it by the whole current of our decisions. But the question is not left to inference. It is supported by the express opinions and direct decisions of our courts. In the case of *Dott* v. *Cunnington*, 1 Bay, 453, it is said, "It cannot be denied that in many cases *personal chattels* or terms for years, may be limited over, either by executory devises, *or deeds*, as effectually as real estate, if it is not attempted to render them unalienable beyond the duration of lives (in being), or twenty-one years after (see page 456). And although in that case it was held, that the property vested in the first taker, yet it was on the ground that the limitation was too remote, and not that a limitation over after a life estate, was not good. On the contrary, throughout the whole argument of the court it is manifest the limitation over would have been supported, if it had not gone so far as to create a perpetuity. In the case of *Stockton* v. *Martin*, 2 Bay, 471, similar language is used. And although in that case, also, it was held that the contingency on which the property was to go was too remote, being after an indefinite failure of issue, yet it was on that ground and on that alone that the limitation was not supported. In the case of *Tucker* v. *The Executors of Stevens*, 4 Des. 532, the question was directly decided. That was a deed of gift of a brother to his sister for life, with a limitation over to such issue as should be living at the time of her death, and the court supported the right of the children under the deed. That was indeed only a circuit decision, and therefore cannot be relied on as a binding authority. But it was the opinion of a very able and learned chancellor, whose opinion is always of high authority, and the acquiescence of the counsel is evidence of the prevailing

opinion of the bar. We are supported, then, by the opinions of the highest tribunals of the country from the year 1794. And those not expressed as mere speculative and doubtful opinions, but as the settled principles of law. And those successive opinions, from such sources, for such a length of time, though not expressed in the most solemn form, ought now to be considered as conclusive authority upon this court. I concur therefore in the opinion of the presiding judge on the effect of this deed. I have not entered into the inquiry whether it may not be supported upon some other construction. For the view which I have taken of it covers the whole ground, and if correct renders it perfectly immaterial whether it is not susceptible of some other construction which would lead to the same conclusion. I am of opinion that the plaintiffs showed no title in themselves, and that the nonsuit was properly ordered. The motion must therefore be refused.

COLCOCK, J., and JOHNSON, J., concurred.

Motion refused.[1]

BRUMMET *v.* BARBER.

SOUTH CAROLINA COURT OF APPEALS. 1834.

[*Reported* 2 *Hill*, 543.]

TROVER for negroes. The plaintiff claimed as the son of Spencer Brummet, and the defendant as the administratrix of Nathaniel Barber, dec'd. The jury, in a special verdict, found the following facts: That the negroes Sine and Mille, who (with their increase) are the subjects of this action, originally belonged to Spencer Brummet and Daniel Brummet; that they gave the negroes to Comfort Perry, their niece; and, through William Brummet, delivered them to her father, Zadock Perry, who, at the time, signed the following receipt or acknowledgment in writing, as containing the terms and limitations of the gift: "I say received of William Brummet, for the use of my daughter Comfort Perry and the heirs of her body, two negro girls, named Sine and Mille; but should the said Comfort die without children to heir the said negroes, then the said negroes are to return to the sons of Spencer and Daniel Brummet, and their heirs forever. This 8th day of January, 1792.

(Signed) ZADOCK PERRY."

That Comfort Perry intermarried with Nathaniel Barber, and the negroes in question thereupon went into his possession, on which occasion he signed the following instrument, referring to the former receipt

[1] The law in North Carolina is *held* otherwise, Gray, Perpetuities, §§ 92-94. In accordance with the common doctrine that a parol gift of chattels is not good without delivery (See 1 Gray, Cases on Prop. 165 *et seqq.*), a parol gift of chattels to take effect *in futuro* has generally been held bad. Gray, Perpetuities, § 96.

of Zadock Perry, and acknowledging that he took the negroes agreeably to its terms, to wit: —

"Received of Zadock Perry two negro women, named Sine and Mille, and their increase, agreeable to a receipt in the hands of Daniel and Spencer Brummet, it being in full of all debts and demands of the same, likewise a clear receipt for all dues and demands for myself, of the above-named Zadock Perry. I say received by me, this 30th December, 1798.

(Signed) NATH'L BARBER."

Comfort Perry (then Mrs. Barber) died in 1829 without issue, having borne a child who died before her death. The negroes afterwards continued in the possession of Nath'l Barber until his death, when they passed into the hands of the present defendant, his widow and administratrix, who holds and claims them in right of her intestate. Daniel Brummet died without issue, and Spencer Brummet died leaving the plaintiff, his only son, who claims under the limitation over on the gift to Comfort Perry. If the court should be of opinion, from these facts, that the plaintiff is entitled to recover, the jury find for the plaintiff eight thousand five hundred dollars; but if the court should hold otherwise, they find for the defendant.

The presiding judge ordered the *postea* to be delivered to the defendant.

The plaintiff appealed, and moved to reverse the decision of the Circuit Court, and for leave to enter judgment for the plaintiff, on the ground: That upon the proper construction of the instruments in writing, connected with the facts found by the jury, the conditions and limitations therein expressed are valid and effectual, and the plaintiff entitled to recover.

The defendant also appealed, and moved for a nonsuit or a new trial, on the grounds: —

1. That the receipt signed by Zadock Perry was improperly received in evidence.

2. That the finding of the jury that the negroes belonged to Spencer and Daniel Brummet was without evidence.

3. That the limitation condition, or trust of the gift, was by parol, and cannot, therefore, be sustained.

Clarke and *Wm. F. Desaussure*, for the plaintiff.

Williams and *Blanding*, for the defendant.

O'NEALL, J. In this case several questions are made on the appeal by both the plaintiff and the defendant. Those made by the latter are precedent to the main question involving the plaintiff's right to recover. They will be first considered.

1. It is contended that the paper signed by Zadock Perry, and containing the terms on which he received the slaves from the Brummets, for the use of Comfort Perry, was improperly received in evidence. Regarding Zadock Perry as the bailee or trustee of the property for Comfort Perry and the other parties entitled to take under the bail-

ment or trust, there can be no doubt that the paper is properly in evidence. It is, indeed, the evidence of the bailment made or trust created. For it is the undertaking of the bailee or trustee to deliver over the property to the uses which the bailors or donors directed when they put it into his possession.

But if there could be any doubt about the matter after this illustration of it, still, in another point of view, it would be removed. The verdict of the jury has found the fact that Nathaniel Barber, the husband of Comfort Perry, and the intestate of the defendant, when he received the possession of the said property from Zadock Perry, "executed the paper signed N. Barber, bearing date 30th December, 1798, referring to the former receipt of Zadock Perry, and acknowledging that he received the negroes agreeable to that receipt." This made the paper signed by Zadock Perry the same as if it had been signed by Nathaniel Barber; and it is, hence, his admission of the manner in which he held possession of the said slaves. In this point of view, it is perfectly clear that it was properly admitted to be read in evidence on the trial of this cause.

2. It is supposed that the jury improperly found the said slaves to have been the property of Spencer and Daniel Brummet, the supposed donors. The fact, that Zadock Perry received from William Brummet the negroes for the use of his daughter, and the heirs of her body; but if she should die without children, then that they were *to return* to the sons of Spencer and Daniel Brummet, goes, in itself, very far to show that Spencer and Daniel were the owners and donors. For the words "to return" mean, in ordinary acceptation, to go back; as used in this paper, they would fairly mean and imply, that if the donee and her descendants could not enjoy the property, then that *it should go back* to a part of the family of the persons from whom it came. When the receipts of Perry and Barber are connected with the testimony of Mrs. Gregory, they abundantly sustain the verdict in this behalf.

3. It is urged by the defendant that a limitation over in personalty cannot be created by a writing not under seal. To meet this objection fairly, this case ought to be considered in two different points of view: 1st, as a trust in chattels personal; 2d, as a direct gift.

Upon examining the case in the first point of view, there seems to be nothing to prevent a trust in personalty from being created by parol, either written or unwritten. The 7th and 8th sections of the Statute of Frauds and Perjuries require all declarations or creations of trusts or confidences, *in lands, tenements, or hereditaments* (except implied or constructive trusts), *to be in writing*, signed by the party, who is, by law, enabled to declare such trust, or by his last will in writing. P. L. 83. This provision applies altogether to land, leaving personal property still, as at common law; but it is useful to see that even in real estate, and by Statute, it is not necessary to declare or create a trust, that the same should be declared or created by deed. What is a trust in personalty at common law? It is a mere bailment, the

delivery of a thing to one person, on the confidence that he would deliver it to another. The illustrations of the principle established in *Jones* v. *Cole*, 2 Bail. 332, show that this is the correct notion of a trust in personal property. This being so, it may be created by any words or acts which show that the party in possession received it for another; or for himself and another together; or for himself for his own life, or the life of another, and then that it go over in remainder or reversion. Each of these cases, as well as all other cases of qualified interests in personal property in possession, are, most generally, nothing more than legal trusts, or, as they are more technically termed, bailments. These arise from the fact that the possession is fiduciary, and not in one's own right. That parol is competent to qualify possession, has never been doubted. But to show the admissibility of mere *word of mouth*, to make out a trust, in personal property, to the satisfaction of every one, let us state a plain and common case. A. is in the possession of goods, which he verbally admits he is entitled to hold only for his own life, and then that they are to go over to B. or to return to the donor C. Who would doubt that on proof of such an admission, B. or C. (as the case might be), would be entitled, after the termination of A.'s life estate, to recover against his personal representatives, who might be in possession of the goods? Why is this so? Because his admission shows that his right of property extended only during his own life, and this being consistent with his possession, the latter could confer no higher or greater right; and that thus being a tenant for life, in possession, acknowledging the remainder or reversion, he is a trustee for the preservation of the same.

In the case under examination, connect Zadock Perry's receipt with Nathaniel Barber's (which is the true position of the case), and divest it, for the present, of the question as to the validity of the limitation over, and a plain acknowledgment, on the part of Nathaniel Barber, is made out, that he held the negroes absolutely, if his wife Comfort should die leaving children; but if she should die without having children, then that the negroes should go over to the sons of Spencer and Daniel Brummet. This is not a covenant to stand seised to uses, which, as is very properly said in *Porter* v. *Ingram*, 4 M'C. 201, applies altogether to real estate; but it is an acknowledgment that Nathaniel Barber is in possession, on the trust and confidence, that on the death of his wife without children, he would deliver over the slaves to the remaindermen, or, as it really turned out, to the remainderman the plaintiff. There is nothing to prevent such a future expectancy, by way of trust, from being created by any instrument of writing. For in *Powell* v. *Brown*, 1 Bail. 100, it was held that a future interest in a chattel personal might be created or reserved, by way of remainder or reversion by deed. Let it be borne in mind, that to pass personal property, a deed is not necessary; that it was the nature of the thing itself, its perishableness, which at common law originally forbade an estate in remainder or in reversion in it. This ancient and strict notion of the

common law having given way to the change in the value and nature of personal property, such an interest is now permitted to be raised and to exist; and it follows, that if it can be created or reserved by deed, which never was essential to the transmission of personal property, it may be in any other way in which personalty may be passed from one person to another, as by delivery of possession according to mere word of mouth, or any written instrument defining the interest to be taken and enjoyed therein.

If, however, in this case, we discard all the doctrine in relation to trusts of personal property, and consider it as a gift, evidenced by the admission of Barber, properly inferred from his receipt in connection with and explained by that of Zadock Perry, I think the limitation over, created by a parol instrument of writing, is good, as between the plaintiff, the remainderman, and the defendant, the widow of Nathaniel Barber, the tenant *per auter vie*. It seems to be clear that anything which will be good and effectual in law to pass personal property must be equally so to limit it; and this I take to be the settled principle, properly deducible from the case of *Dupree* v. *Harrington*, and *Reeves* v. *Harris*.

In *Dupree* v. *Harrington*, State Rep. 391, it was held, that a written stipulation in a note given for the purchase of a mare, "that the mare should remain the property of the vendor until half the price was paid," was good and valid; and that the property remained in the vendor, notwithstanding the possession was in the vendee, until the condition was complied with. If, *by writing*, the right of property may be retained after the vendor has delivered possession of personal property, it would seem to follow that the owner of it might, at the time he parts with the possession, create or reserve, *by writing*, any future interest which was not too remote.

In *Reeves* v. *Harris*, 1 Bail. 563, a verbal condition on the sale of a horse, that he should still remain the property of the vendor, until the price was paid, notwithstanding the vendor delivered the possession to the vendee, was held to be legal even against a creditor. As *between the vendor and a creditor*, that case is, I think, an anomalous and unsound authority. For in *Dupree* v. *Harrington*, on the authority of which it professes to be decided, the question was between the vendor and the administrator of the purchaser. So far, *between the parties*, the principle of both cases is right; as between them any conditions which enter into their contract, either verbally or in writing, must be binding. So, too, in a gift of personalty: the donor may, in writing or verbally, annex any conditions he pleases, provided they be not in other respects contrary to law; and if the donee accept the gift under such conditions, he will be bound by them.

4. This brings up for consideration the limitation itself in the paper made by Zadock Perry, and adopted by Nathaniel Barber, the defendant's intestate. Is it too remote? I think not. [The discussion on this point is omitted.]

The motion to reverse the decision of the judge below, and for leave to the plaintiff to enter up judgment for his damages on the special verdict, is granted.

JOHNSON and HARPER, JJ., concurred.[1]

HILL *v.* HILL.

SOUTH CAROLINA COURT OF CHANCERY AND COURT OF APPEALS. 1836, 1837.

[*Reported Dudl. Eq.* 71.]

BILL in equity[2] by Jonathan M. Hill and Lucinda his wife (formerly Lucinda Bond) against the administrators of the estate of Felix Paddon Bond. The facts as they appeared by the bill and answer, on which the case was submitted to the court, were as follows: —

John P. Bond, by deed dated August 2, 1823, gave certain negroes to his son Felix Paddon, "to be his right," with their future increase from the date of the deed, others in like terms to his daughter Lucinda, the female plaintiff, and still others in like terms to each of his sons, Moses and Theodore S. The *habendum* of the deed was as follows: "To have, hold, and enjoy all and singular the said negroes, as above designated, unto the said Felix P., Lucinda, Moses and Theodore S. Bond, their heirs and assigns forever, — to be and remain their right and property, that if either one or more of the said above-named children should die without a lawful issue, that the deceased's part or parts shall be equally divided amongst the *survivors nominated in this deed*, against me, my heirs, executors, administrators, or assigns, and against every other person or persons whomsoever."

The three sons died unmarried and without issue, leaving Lucinda the sole survivor. This bill was brought to enforce her right to the negroes as sole survivor.

JOHNSTON, CH. The grantor gives to four of his children separately, and by separate clauses of his deed, certain slaves, "to be his (or her) right," with their future increase from the date of the deed: and then concludes with the following general clause, "to have, hold, and enjoy the said negroes unto the said Felix, Lucinda, Moses, and Theodore" (his said four children), "their heirs and assigns forever, to be and remain their right and property, that if either one or more of the above-named children should die without a lawful issue, that the deceased's part or parts shall be equally divided amongst the *survivors* nominated in this deed."

[1] But see Gray, Perpetuities, § 96.

[2] The following short statement is substituted for that in the report.

Three sons having died without issue (never having been married), the daughter, now wife of Jonathan M. Hill, claims the slaves as *survivor*; which claim the defendants resist on the following grounds:

1. That this gift was an attempt to limit over a fee in personalty after a fee, which cannot be done by deed, unless by way of trust.

2. That the limitation over is too remote, and, therefore, void; and that an absolute title vested in the deceased's children as first takers.

The case will be decided by considering these objections:

No case has been pointed out in which the first point has been decided by our own courts, nor have I found any; but I entertain no doubt upon the subject.

I am entirely satisfied with the observations of the late Court of Appeals on this point in *Powell* v. *Brown*, 1 Bailey, 100; where, although the case turned on another point, this was much considered. I have nothing to say which can add to the force of the remarks made in that case. I will attempt, however, to put the question before us here in another point of view.

The real question seems to be simply this: Can a grantor, in conveying a perpetual title in personalty, annex a condition upon which that title shall be devested? Can he annex a clause of defeasance? Every mortgage of personalty is an affirmative answer to the question.

This is also expressly decided in *Brummet* v. *Barber*, 2 Hill, 543.

If a grantor can provide a contingency upon which the title shall determine and revert to himself, what principle forbids his substituting other persons for himself, to receive the returning property when the contingency shall happen? To the first grantees (and it is their interests we are now considering) it must be a matter of indifference whether the person to receive the property from them shall be the grantor or his assignee.

Let us now inquire into the second objection made. [This inquiry is omitted. The learned Chancellor determined that the limitation was not too remote.]

Let an account be taken according to the principles of this decree. The costs to be paid out of the fund in controversy.

The defendants appealed, and moved to reverse the decree on the two grounds stated in it; and also on the ground that the complainants had, as to the negroes they claimed, a plain and adequate remedy at law.

The appeal was argued 10th May, 1837, by *Wardlaw* and *Wardlaw* for the appellants, and by *Bauskett*, *Burt*, and *J. J. Caldwell*, contra. The court took time to consider, and at November Term, 1837, delivered its opinion.

JOHNSTON, CH. The two questions argued before us are: —

1st. Whether the limitations over are not void for remoteness.

2d. Whether such limitations can be made directly by deed.

It did appear to me so indisputable that the limitations were not too remote that I confess I was surprised when I learned that an appeal was taken from that part of the circuit decree. [That part of

the opinion in which the objection of remoteness is considered and overruled, is omitted.]

I come now to the second question, which is, whether interests amounting to executory devises, in personalty, can be directly conveyed by deed, without the intervention of a trustee.

It appears that notwithstanding the cases of *Powell* v. *Brown*, 1 Bail. R. 100, and *Barber* v. *Brummet*, 2 Hill, this is still thought to be a debatable question. But it does appear to me that whatever be the law elsewhere, it is with us as laid down in these decisions: that whatever it may have been supposed to be in this State before these were made, there ought to be no doubt since; and that even if such a deed could not be supported at law, it should be executed according to its true intent in this court.

The case of *Cooper* v. *Cooper*, mentioned by my Brother Johnson in *Powell* v. *Brown*, appears never to have received the approbation or confidence of the profession. It attracted so little attention that in *Tucker* v. *Stevens*, 4 Des. R. 532, which was tried but a few years after it was decided, the question as to the validity of such deeds, if indeed it was a question in equity, was regarded as so desperate that although it might have been made in the case, the counsel preferred attacking a limitation very clearly valid.

Then followed immediately the case of *Milledge* v. *Lamar*, 4 Eq. R. 617, where there is enough to satisfy the profession that the court differed in no respect from the bar in their estimate of the doctrines said to have been held in *Cooper* v. *Cooper*.

As early as *Dott* v. *Cunningham* the same sentiment appears to have prevailed. It appears by the authorities cited by them that the counsel on one side did venture to raise the question. The strength of the argument, however, on both sides was addressed to another point, which seems to have been seriously contested. As to this it was not regarded as requiring an answer; or was so satisfactorily answered that the court did not even notice it in its decision.

There has been, I understand, a constant expectation, of long standing, by the profession, that whenever the point should be made, as a dry question of law, such deed would be supported. This confidence was not shaken by *Cooper* v. *Cooper*.

It drew forth the deliberate opinion of the court of law in *Powell* v. *Brown*. The bar and the community, having long looked for such an opinion, cheerfully acquiesced in it.

Then came *Barber* v. *Brummet*. I have heard of no discontent with that opinion.

I admit that in *Powell* v. *Brown* this was not a necessary point. But the opinion was expressed deliberately. And I acknowledge that in *Barber* v. *Brummet* the instrument was a trust paper. But the court treated it as a legal instrument.

It would seem that if, after all this, any doubt still lingers, it should be dispelled.

The law-courts, after the solemn pledge they have given, cannot dissent from the doctrine they have laid down, without incalculable injury to the community. Contracts have been made and deeds executed on the faith of it. And that doctrine should not now be abandoned, unless it is grossly unjust in its effects, or has produced confusion by violating some fundamental and valuable principle of law. I am persuaded it is not only just in itself, and better calculated to effectuate the intentions of parties than the narrow technical common law rule, which it is supposed to have infringed, but that, in this court at least, confusion can never ensue from it.

If the law-court had never given the opinions it has, and if "in point of law as distinguished from equity," the limitations contained in the deed under consideration were ineffectual, I should not hesitate to declare that this tribunal is bound by the ancient and well-known principles, which characterize its jurisdiction, to execute the instrument according to its true intent.

While the law rule was yet so inflexibly barbarous that title in personalty, but for a moment, was title absolutely and forever, equity, looking to what conscience and common honesty demanded, applied herself to the enforcement of the real intention of the parties; and for this purpose declared trusts to support the successive interests held in personalty.

This is the great principle of the forum, without which it does not deserve its name.

Slowly, and at long intervals, the law-courts followed, and recognized and supported successive interests in chattels as titles. They have at last decreed that deeds, such as are questioned here, are valid. And shall this court choose such a moment to abandon its own principles?

It is said those principles have never yet been applied to the case of a direct deed. But if the principles exist and are applicable, and justice demands it, why not apply them? Principles exist only for the purpose of being applied.

There is, there can be, no difference, in any sound judgment, between compelling a life tenant to do justice to a remainderman, and enforcing the instrument before us. The case is, to all intents and purposes, that of an absolute title, devested upon a contingency, and cut down to a title for life, with remainder over. It can be effected as much by a trust, as if it were a case of title for life with remainder.

It is said that it is an executory devise, and that it may be difficult to enforce it. If it were a will, and the executor had assented to the first legacy, would we feel the difficulty? We felt none in *Heyward* v. *Glover*, 2 Hill Ch. R., nor in *Gregg* v. *Hurllee*, just decided. Yet the difficulty in cases of wills, with assent to the first taker, in which the title has passed, is the same as in the case of a deed containing the same provisions.

The supposed defect here is the want of a trustee. Equity will never let the intention fail for want of one. She will never let a man defeat the ulterior provisions of the very instrument under which he holds.

The supposed inaccuracy, in the circuit decree, in classing the contingency upon which the limitations are to take effect as a condition, is not perceived. When a title is defeasible upon condition, the condition must be performed before this court will interpose. When it is defeasible upon contingency, equity will surely enforce the limitation when the contingency has happened. A limitation to a survivor, as survivor, is really a limitation upon condition that the person to take shall survive; if he does, he has performed the condition, and thereby becomes entitled.

It is ordered that the motion be dismissed.

WILSON *v.* COCKRILL.

SUPREME COURT OF MISSOURI. 1843.

[*Reported* 8 *Mo.* 1.]

SCOTT, J., delivered the opinion of the court.[1]

This was an action of replevin, instituted by the appellant, plaintiff, against the appellee, defendant, for a slave named Sally, in which the appellant submitted to a nonsuit, and, after a refusal by the court below to set aside, appealed to this court.

It appears that Micajah Woods, in consideration of the love and affection which he bore his grandchildren, Juliet Walker Wilson and William Henry Wilson, gave unto the said Juliet W. Wilson, her executors, administrators, and assigns, one negro woman, Malinda, and three of her children, one boy, Allen, and two girls, Sally Anderson and Mary Ann; and in like manner he gave to William H. Wilson three other children of the above-named woman Malinda, viz., one girl, Queen, and two boys, Alexander and Reuben; to have and to hold the said negroes unto them, the said Juliet W. and William H. Wilson, their executors, administrators, and assigns forever: but should either the said Juliet W. or William H. Wilson die without heirs, then the property of the one so dying shall absolutely vest in the other. The instrument of the gift was a deed. The appellant is one of the donees mentioned in the deed. Juliet W. Wilson, the other donee, intermarried with Alfred Mann, and after being delivered of a dead child, died herself in childbed, leaving no children. The slave Sally, for which the suit was instituted, is the same named in the deed of gift, and given to Juliet W. Wilson. Mann, after his marriage, and before the death of his wife, sold the said slave to the appellee, Cockrill.

Micajah Woods, the donor, was a resident of Albemarle County, Virginia, and executed the deed of gift to his grandchildren on the eve

[1] The opinion only is given.

of their departure from his home, where they had lived since the death of their mother. They left their grandfather's house for the purpose of coming to this State, where their father had resided for a number of years, and by whom they were sent for.

On one part it was maintained that the appellant, the surviving donee, was entitled to the slave in dispute, by virtue of that clause in the deed of gift which provides that, if either the said Juliet W. Wilson or William H. Wilson shall die without heirs, then the property of the one so dying shall vest absolutely in the other.

On the other hand it was contended, that the limitation over, being after an indefinite failure of heirs, was too remote, and therefore void; consequently, that the entire property in the slaves vested in the first taker: that if the limitation over was not too remote, and could be construed so as to bring it within the period the law allows an estate to vest, viz., a life or lives in being twenty-one years and some months, yet such contingent interests can only be created by a will or conveyance under the Statute of Uses, and not by a common law conveyance.

It was a principle of the common law that no person but the feoffor, or grantor, and his heirs could take advantage of the breach of an express condition or conditions created by deed; hence, if a freehold estate be conveyed to one, and words of condition be used, and there be a limitation over to a third person, in case the condition be broken, yet upon breach of the condition, the feoffor, or grantor, or his heirs must enter, in order to avoid the estate: for whatever estate was created by livery could only be defeated by entry, and to permit him, the commencement of whose estate depended upon a breach of the condition, to enter, in order to take advantage of it, was allowing the assignment of a chose in action, which, for the purpose of preventing maintenance and oppression, the common law forbade. It was also a rule, that when the feoffor, or grantor, entered to take advantage of a breach of a condition, his entry defeated the livery made at the commencement of the estate, and all subsequent estates depending on the first were thereby defeated and gone: hence the principle, that a remainder, properly so-called, cannot be limited by a common law conveyance to take effect upon a condition which is to defeat the particular estate. Inasmuch as such limitations were, however, found exceedingly convenient in making provisions for families, they were afterwards allowed, when created by will or conveyance under the Statute of Uses, by the denomination of executory devises and conditional limitations.

The authorities are all united in declaring that interests similar to that claimed by the appellant in the slave in controversy, which is a remainder limited to take effect after a disposal of the entire property in the thing by the grantor, can only be created by a conveyance operating under the Statute of Uses, or by will. (4 Kent, 128; Fearne, 10, 391; Tucker's Com., 90, 144.) Judge Tucker remarks, that Blackstone, vol. 2, pp. 155, 6, puts the case of a conditional limitation by a

common law conveyance, and cites *Fry* v. *Porter*, Ventris, 202, as an authority in support of such a mode of limitation; but, he observes, all the elementary writers state the case as a devise, and Kent refers to the same case as an authority for the position that conditional limitations, though not valid in the old conveyance at common law, yet within certain limits they are good in wills and conveyances to uses.

It was insisted by the appellant that the intention of the grantor was to give the slaves to Juliet W. Wilson forever; but if she died without leaving children at her death, then they should go to the appellant, if he survived.

It may be admitted that such was the intention of the grantor. When a donor has such an intent, and wishes to have it effected, the law has prescribed particular modes or forms in which that intent must be expressed, otherwise it cannot be regarded. The grantor by deed gave an absolute interest in property to one, and after thus parting with all his estate, wished to give a right to the same property to another, upon the happening of a certain event. That wish, in order to be carried into effect by the courts of law, must be expressed in one of two modes. The grantor has not adopted either of the modes required by law; his intentions, therefore, cannot prevail. *Betty* v. *Moore*, 1 Dana, is a direct authority upon this point.

Butler says (Thomas' Coke, 2d vol., p. 761, 2), "Executory devises originated in the indulgence shown to testators in effectuating their intentions, whereby the judges were induced, in cases of wills, as well as in limitations of uses, to dispense with the strict rules of the common law, according to which no remainder could be limited over after an estate in fee-simple, nor a freehold be created to commence in future: an executory devise or bequest is, therefore, such a limitation of a future estate, or interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law."

In the case of *Jackson* v. *Anderson* (16 I. Rep.) the principle is stated, that in construing limitations, we are to look at the words of the instrument by which they are limited, and no circumstance transpiring subsequently affecting the limitees is to have any weight in ascertaining their validity. If, by the words of their creation, they may possibly endure forever, they are considered as estates in fee, though in fact they may terminate in less time than a life in being. If the limitation over to William H. Wilson be tested by this rule, it is impossible to say that Juliet W. Wilson did not take an estate in the slaves which might endure forever, consequently it was an estate granted after the disposal of the grantor's entire interest in the property, and therefore could not be made by deed or conveyance at common law.

Not one of the many cases produced in support of the claim of the appellant, except the case of *Higgenbotham* v. *Rucker* (2 Call), arose on the construction of a common law conveyance. The limitations in

all of them were by will or conveyance under the Statute of Uses. The question did not arise in the case of *Higgenbotham* v. *Rucker*, if the limitation in that case was made by deed; and so we may infer, from the report of it, the objection was not made, and no opinion was expressed in relation to it. The other cases cited by the appellant, to show that such an interest as he claims in the slave in dispute may be created by a common law conveyance, or, which is the same thing, by deed, — *Keene and West* v. *Macy*, 3 Bibb, 39; *Wright* v. *Cartwright*, 1 Burr. 162; *Powell* v. *Brown*, 1 Bailey's S. C. Rep. 100, — are authorities in support of the principle, that chattels may be limited by deed to one for *life*, with remainder over to another; and the limitation over, after the life-interest in the chattel has expired, is good. By the ancient common law there could be no limitation over of a chattel, but the gift for life carried the entire interest. This rule was relaxed at first in favor of wills, and afterwards such limitations were permitted by deed.

We do not wish to be understood as expressing the opinion that the limitation over to the appellant would have been valid had the same been created by will or conveyance under the Statute of Uses; conceiving that the question does not arise, we express no opinion in relation to it.

We are not clear, under the circumstances stated in the record, that the validity of the limitation contained in the deed should be determined by the laws of Virginia.

Even should the laws of that State govern us in ascertaining whether it is allowable or not, the counsel of the appellant did not maintain that they are different from those which prevail in this State.

The doctrine, as established in New York and Massachusetts, is, that the courts will not take judicial cognizance of any of the laws of our sister States at variance with the common law, but upon common law questions the legal presumption is that the common law of a sister State is similar to that of our own. 10 Wend. 75, *Holmes* v. *Broughton*.

Judgment affirmed.[1]

Leonard, for appellant.
Davis, *Todd*, and *Kirtley*, for appellee.

ROGERS *v.* RANDALL.

South Carolina Court of Appeals. 1842.

[*Reported* 2 *Speers*, 38.]

Trover for a negro woman, Lydia, and her children.

John Rogers died, leaving three sons, John, William, and James, and one daughter, Mary. By his will, dated in 1826, he gave legacies

[1] See Gray, Perpetuities, §§ 91 *n.*, 95.

to each of his other children, and to William ten negroes, including Lydia, and all their future increase, to him and his heirs forever. A succeeding clause is in the following words: "*Item:* It is my will and desire that if any of my said four children should die before marriage, without leaving lawful issue, then, and in that case, the share of property which I have given to them, or either of them, with all their future increase, is to be equally divided among the surviving part of them and their heirs forever." The executors delivered their several legacies to the children. On the 23d August, 1832, William, in consideration of $300, executed an absolute title of Lydia, then ten or eleven years old, with warranty, to the defendant, who had no notice of the limitations in the will. John and Mary died, and on the first of March, 1838, William died, before marriage, and without lawful issue, leaving the plaintiff, James, sole survivor of the four children. In September, 1841, the plaintiff demanded Lydia and her children from the defendant, who refused to deliver them. Lydia had then two children, the oldest of which is now about four years old, and the other about two; a third has been born since the commencement of this suit. The estimates of value varied, the woman's, at the trial, from $350 to $500; in 1838, from $400 to $600; the two children, from $200 to $400. The hire of the whole was estimated by some at $30 a year, and by others at not more than the cost of good treatment. The presiding judge overruled a motion for a nonsuit, and instructed the jury, in their estimate of damages, to consider the circumstances which should lead to the adoption of the lowest estimate within the discretion of the jury. The verdict was for plaintiff, $800.

Defendant appealed, on the following grounds: —

First. That by the true legal construction of the will of John Rogers, William Rogers took an absolute estate in the slaves in question, and that the limitation over, to the testator's surviving children, was void.

And for a new trial on the following ground: —

Second. That as defendant was a *bona fide* purchaser from William Rogers of the slave Lydia, and as there was no evidence of a wrongful conversion, nor of a demand, until 1841, the measure of damages should have been the amount of his said purchase, with interest from the time of the demand.

Monroe, for the motion.

Harllee, contra.

Curia, per WARDLAW, J. By the will of his father, William Rogers took, in the negroes bequeathed to him, a fee simple, subject to a limitation, by way of executory bequest, to such of his brothers and sisters as might survive him, upon the contingency of his dying without having been married, and without leaving lawful issue; the contingency is, in effect, the same as if it had been only, "before marriage." If it had been "before marriage and *without issue*," as it must necessarily have happened, if at all, within the lawful period of limitations, the gener-

ality of the expression "without issue" would have been restrained by the superaddition of "before marriage," which necessarily confined the event to his lifetime, or the instant of his death. In the case before us, even if the "and," which is omitted by ellipsis, had been supplied by "or," so that the contingency should read, "die before marriage *or* without leaving lawful issue," it would, in effect, have been the same as if it had been merely, "die without leaving lawful issue," and so, would not have been too remote in reference to personalty.

The jury were bound to find the value and hire; they had a discretion between the highest and lowest estimates. I have perhaps too little regarded the circumstances which should have inclined them to the latter; but there is no departure from the prescribed bounds, which would authorize the interference of this court.

The motions are dismissed.

O'NEALL, EVANS, RICHARDSON, and BUTLER, JJ., concurred.

NOTE. — On the giving of security by one having only a life interest in chattels, see 2 Jarm. Wills (Bigelow's ed.) 880; 2 Woerner, Amer. Law of Adm. § 456; Gray, Perpetuities, § 90, note.

On the right to a stock dividend of one having a life interest in the shares of a corporation, see 2 Woerner, § 457.

CHAPTER VI.

EXECUTORY DEVISES AND BEQUESTS.

SECTION I.

IN GENERAL.

PELLS *v.* BROWN.

KING'S BENCH. 1620.

[*Reported Cro. Jac.* 590.]

REPLEVIN for the taking of three cows at Rowdham. The defendant justifies for *damage fesant* as in his freehold. The plaintiff traverseth the freehold; and, thereupon being at issue, a special verdict was found, in which the case appeared to be, That one William Brown, father to the defendant, being seised of this land in fee, having issue the defendant, his son and heir, and Thomas Brown his second son, and Richard Brown, a third son, by his will in writing devised this land to "Thomas his son and his heirs forever, *paying* to his brother Richard twenty pounds at the age of twenty-one years; and if Thomas died without issue, living William his brother, that then William his brother should have those lands to him, and his heirs and assigns forever, *paying* the said sum as Thomas should have paid." Thomas enters, and suffers a common recovery, with a single voucher, to the use of himself and his heirs; and afterwards devises it to the wife of Edward Pells, the plaintiff, and her heirs; and dies without issue, living the said William Brown, who entered upon Edward Pells, and took the distress.

This case was twice argued at the bar, and afterward at the bench; and the matter was divided into three points.

First, whether Thomas had an estate in fee, or in fee-tail only?

Secondly, Admitting he had a fee, whether this limitation of the fee to William be good to limit a fee upon a fee?

Thirdly, If Thomas hath a fee, and William only a possibility to have a fee, Whether this recovery shall bar William, or that it be such an estate as cannot be extirpated by recovery or otherwise?

As to the first, all the justices resolved, that it is not an estate-tail in Thomas, but an estate in fee; for it is devised to him and his heirs forever; and also *paying* to Richard twenty pounds; both which clauses show that he intended a fee to him. And the clause, "if he died without issue," is not absolute and indefinite, whensoever he died without

issue, but it is with a contingency, "if he died without issue, living William;" for he might survive William, or have issue alive at the time of his death, living William; in which cases William should never have it, but is only to have it if Thomas died without issue, living William. *Vide* 19 Hen. 6, *pl.* 74. 12 Edw. 3, *pl.* 8. 7 Co. 41, *Berisford's Case*. 10 Co. 50, *Lampet's Case*. And therefore it is not like to the cases cited on the other part, 5 Hen. 5, *pl.* 6, 37. Ass. *pl.* 15 & 16, and Dyer, 330, *Clactey's Case;* for it is an exposition of his intent what issue should have it, viz. of his body; and whensoever he died without issue, the land should remain, &c. But here it is a conditional limitation to another, if such a thing happen; and therefore they all relied upon the book, Dyer, 124, and Dyer, 354, which are all one with this case.

Secondly, They all agreed that this is a good limitation of the fee to William by way of that contingency, not by way of immediate remainder; for they all agreed it cannot be by remainder; as, if one deviseth land to one and his heirs, and if he die without heir, that it shall remain to another, it is void and repugnant to the estate; for one fee cannot be in remainder after another; for the law doth not expect the determination of a fee by his dying without heirs, and therefore cannot appoint a remainder to begin upon determination thereof, as 19 Hen. 8, *pl.* 8, and 29 Hen. 8, Dyer, 33. But by way of contingency, and by way of executory devise to another, to determine the one estate and limit it to another, upon an act to be performed, or in failure of performance thereof &c., for the one may be and hath always been allowed: as devise of his land to his executors to sell, if his heir fail of payment of such a sum at such a day, this is an executory devise. So the case cited in *Boraston's Case*, 3 Co. 20, of *Wellock and Hammond*, where a devise was to the eldest son and heirs, paying such a sum to the younger sons, otherwise that the land should be to him and his heirs, is a good executory devise. And a precedent was shown, Trinity Term, 38 Eliz. Roll. 867, *Fulmerston* v. *Steward*, where upon special verdict it was adjudged, that whereas Sir Richard Fulmerston devised to Sir Edward Cleere and Frances his wife, daughter and heir of the said Sir Richard Fulmerston, certain lands in Elden, in the county of Norfolk, to them and the heirs of Sir Edward Cleere, upon condition they should assure lands in such places to his executors and their heirs, to perform his will; and if he failed, then he devised the said lands in Elden to his executors and their heirs; it was adjudged to be a good limitation and no condition; for if it should be a condition, it should be destroyed by the descent to the heir; but it is a limitation, and as an executory devise to his executors, who for non-performance of the said acts entered and sold; and adjudged good. So here, &c., for it is a good executory devise upon this limitation. And Doderidge said, the opinion 29 Hen. 8, Dyer 33, was, that such a limitation in fee upon an estate in fee cannot be, and it had been oftentimes adjudged contrary thereto.

To the third point, Doderidge held, that this recovery should bar

William; for he had but a possibility to have a fee, and *quasi* a contingent estate, which is destroyed by this recovery before it came *in esse;* for otherwise it would be a mischievous kind of perpetuity, which could not by any means be destroyed. And although it was objected, that a recovery shall not bar but where a recovery in value extends thereto, as appears by *Capel's Case*, 1 Co. 62 a, where a rent-charge granted by him in remainder was bound, yet he held, that this recovery destroying the immediate estate, all contingencies and dependencies thereupon are bound, and a recovery shall bind every one who cannot falsify it; and here he who hath this possibility cannot falsify it, therefore he shall be bound thereby. But all the other Justices were herein against him, that this recovery shall not bind; for he who suffered the recovery had a fee, and William Brown had but a possibility if he survived Thomas; and Thomas dying without issue in his life, no recovery in value shall extend thereto, unless he had been party by way of vouchee (and then it should; for by entering into the warranty he gave all his possibility; therefore they agreed to the case which *Damport* at the bar cited to be adjudged, 34 Eliz., where a mortgagee suffers a recovery, it shall not bind the mortgagor; but if he had been party by way of voucher, it had been otherwise. And here is not any estate depending upon the estate of Thomas Bray, but a collateral and mere possibility, which shall not be touched by a recovery. And if such recovery should be allowed, then if a man should devise, that his heir should make such a payment to his younger sons or to his executors, otherwise the land should be to them; if the heir by recovery might avoid it, it would be very mischievous, and might frustrate all devises; and there is no such mischief that it should maintain perpetuities, for it is but in a particular case, and upon a mere contingency, which peradventure never may happen, and may be avoided by joining him in the recovery who hath such a contingency: and, on the other part, it would be far more, and a greater mischief, that all executory devises should by such means be destroyed.

Houghton, Justice, in his argument put this case: if a man give or devise lands to one and his heirs as long as J. S. hath issue of his body, he shall not by recovery bind him who made this gift, without making him a party by way of vouchee; for a recovery against tenant in fee-simple never shall bind a collateral interest, title, or possibility, as a condition or covenant, or the like; wherefore they all (except Doderidge) held that this recovery was no bar.

Then Doderidge took exception to the verdict, that the lands were not found to be holden in *soccage;* for otherwise it might be intended to be holden in *knight's service;* and so it shall be intended; and then the devise is void for a third part: and so it was resolved 24 Eliz., Dyer, that it ought to be shown that the land was holden in soccage, otherwise the devise was not good for the entire. But all the Justices held it not to be material (as this case is); for the issue is, whether it were the freehold of William Brown, who is found to be heir to the

devisor. Then although it were admitted that the land was held by knight's service, yet he hath the entire (viz. two parts by the devise, and a third part by descent) : wherefore the tenure is not material, as this case is ; and it was adjudged for the defendant.[1]

GORE *v.* GORE.

CHANCERY. 1722.

[*Reported* 2 *P. Wms.* 28.]

THIS case came on before *Lord Chancellor Macclesfield*, who directed it to be referred to the judges of the King's Bench for their opinion.

The testator William Gore had several sons, Thomas and Edward Gore, &c., and several daughters ; and being seised in fee of divers manors and lands, did, by his will dated 14th July, 1718, devise these lands, &c., to trustees for 500 years, and after the determination of that term, to the first son of his eldest son Thomas (who was then a bachelor), to be begotten in tail male, and so to every other son of the body of Thomas to be begotten in tail male successively ;

Remainder to the testator's second son Edward for life, remainder to his first, &c., son in tail male successively, with divers remainders over.

The trust of the term of 500 years was, to pay the testator's debts and legacies, which were considerable, and likewise to pay £50 per annum annuity to the testator's eldest son for his life, with a power for his said eldest son to distrain for the same, if in arrear, with a power to the testator's younger son Edward to charge the premises with £1,000 apiece for his younger sons or daughters, payable at twenty-one, and with a maintenance for them in the mean time, not exceeding the interest of their portions ; the trustees to raise such portions, and maintenance out of the term for 500 years, and when all the trusts of the term were performed, then the term to attend the inheritance.

Also the testator declared, that the reason why he gave his eldest son Thomas no more than £50 per annum was, because his said eldest son had stood him in a great deal of money, and was to have £400 per annum, in lands in Wiltshire, immediately after his [the testator's] death.

In the February following, the testator died, leaving his eldest son Thomas then a bachelor, who afterwards married, and had a son.

[1] On the growth of the doctrine that executory devises after fees simple are destructible, see Gray, Perpetuities, §§ 142–147, 159.

"A man made a gift in tail, determinable upon his non-payment of a thousand pounds, the remainder over in tail to B. with other remainders ; the tenant in tail before the day of payment of the thousand pounds suffered a common recovery, and doth not pay the thousand pounds ; yet because he was tenant in tail when he suffered the recovery, by that he had barred all, and had an estate in fee by that recovery." — *Per* HALE, C. J., in *Benson* v. *Hodson*, 1 Mod. 108, 111 (1674).

The first question was, whether the devise to the first son of Thomas (the testator's eldest son) was good?

2dly, in whom the freehold of the premises did vest at the death of the testator?

Whereupon all the four judges of the King's Bench that then were, (viz.) PRATT, C. J., POWIS, EYRE. and FORTESCUE ALAND, Justices, certified their opinions under their hands, "that the devise to the eldest son of Thomas Gore was void; that it could not be good as a remainder, for want of a freehold to support it; and that it could not take effect as an executory devise, because it was too remote (viz.), after 500 years." But Lord Macclesfield expressed some dissatisfaction at this opinion of the judges, saying, that though the law might be so, yet the term of 500 years being but a trust term, and to be considered in equity as a security only for money, was not to be so far regarded (at least in equity) as to make the devise over void.

After which the eldest son Thomas Gore and his brother Edward came to an agreement, which was confirmed by the court.

Afterwards Thomas Gore had a son and died, and the son of Thomas Gore bringing this matter over again in Chancery, *Lord Chancellor King* sent it a second time to the Court of King's Bench, where LORD HARDWICKE, C. J., PAGE, PROBYN, and LEE, Justices, certified their opinion against the opinion of their predecessors, (viz.) "That this was a good executory devise, and not too remote; for that it must in all events, one way or other, happen, upon the death of Thomas Gore, whether he should have a son or not, and either upon the birth of the son, or upon his death without issue male, the freehold must vest."

LORD RAYMOND also was of this last opinion.

The two certificates were in the words following: —

"We have heard counsel on both sides on the question above specified, and having considered the same, are of opinion, that the devise of the manors above mentioned to the first son of Thomas Gore is void, because he cannot take by way of remainder, for that there is no freehold to support it; nor can he take by way of executory devise, because it is not to take place within that compass of time which the law allows; and we are also of opinion that the freehold of the same manors, on the death of the devisor, vested in Edward the second son.

JOHN PRATT, LITTLETON POWIS, R. EYRE, J. FORTESCUE ALAND.
—— 1722."

"Upon hearing counsel on both sides, and consideration of this case, we are of opinion, that the devise of the manors of Barrow and Southley to the first son of Thomas Gore is good by way of executory devise, and that the freehold of the said manors, on the death of the devisor, vested in his heir-at-law.

HARDWICKE, F. PAGE, E. PROBYN, W. LEE.[1]
Jan. 26, 1733."

[1] See Gray, Perpetuities, §§ 59, 60. Cf. *In re Lechmere and Lloyd*, 18 Ch. D. 524 (1881); *Miles* v. *Jarvis*, 24 Ch. D. 633 (1883).

HOPKINS *v.* HOPKINS.

CHANCERY. 1734.

[*Reported Cas. Temp. Talb.* 44.]

THE testator, Mr. Hopkins, by his will, devises his real estate to trustees and their heirs, to the use of them and their heirs, in trust for Samuel Hopkins (the plaintiff's only son; which plaintiff is heir-at-law to the testator) for life; and from and after his decease, in trust for the first and every other son of the body of the said Samuel, lawfully to be begotten, and the heirs male of the body of every such son; and for want of such issue, in case the said John Hopkins, the plaintiff, should have any other son or sons of his body lawfully begotten, then in trust for all and every such son and sons respectively and successively, for their respective lives; with the like remainders to their several sons; with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of the said Samuel Hopkins; and for want of such issue, in trust for the first and every other son of the body of Sarah, the said John Hopkins's eldest daughter, lawfully to be begotten; with like remainders to the sons of John Hopkins's other daughters; and for want of such issue, then in trust for the first and every other son of his cousin Anne Dare (wife of Francis Dare) lawfully to be begotten; with like remainders to the heirs male of the body of every such son of the said Anne Dare; and for default of such issue, then in trust for his own right heirs forever: then came two provisos; the one whereby every person that should come into possession of his estate, was to take his name, and bear his arms: the other is in these words: "Provided also, and it is my will, that none of the persons, to whom the said estates are hereby limited for life, shall be in the actual possession thereof, and in the enjoyment of the rents and profits, or of any greater or other part thereof, than as hereinafter is mentioned, until he or they shall have respectively attained his or their ages of twenty-one years; and in the mean time, and until his or their attaining to such age, my trustees and their heirs and executors shall make such allowances thereout, for the handsome and liberal maintenance and education of such person and persons respectively, as they shall think suitable and agreeable to his estate and fortune; and it is my will, that the overplus of the said rents and profits, over and above the annual allowances, or such part thereof as shall remain after all my debts, legacies, and funeral expenses shall be first paid (with the payment whereof I have charged my real estate, in case my personal estate shall not be sufficient for those purposes), do go to such persons as shall first be entitled unto, or come into the actual possession of my said real estate, according to this my will."

Samuel Hopkins died in the testator's lifetime, without issue; and some time after, the testator died without any alteration made of his will: nor had John Hopkins any other son; nor were any of the other remaindermen *in esse* at the testator's death, except ——— Dare, son of Anne Dare.

The first question was, whether by Samuel's death in the testator's lifetime, the several limitations between him and Dare were not become void; there being no particular estate to support them as remainders, by reason of Samuel's death in the testator's lifetime, who was to take the first estate; nor nobody capable of taking at the testator's death but the son of Anne Dare, who thereby claimed the whole interest presently? or whether these intermediate limitations should not inure by way of executory devise to any other son he might hereafter have?

The second question was, in case the limitation to the other sons of John Hopkins was to be looked upon as an executory devise, what should become of the rents and profits in the mean time?

The cause was first heard at the Rolls, and there decreed to be an executory devise.

Mr. Serjeant Eyre and *Mr. Peere Williams* argued that the limitation was not an executory devise.

Mr. Attorney-General, *Mr. Solicitor-General*, *Mr. Verney*, *Mr. Fazakerley*, *Mr. Bootle*, and *Mr. Strange*, contra.

Lord Chancellor [Talbot]. Two questions have been made upon this will: the first is, whether this limitation to the first and every other son of John Hopkins can now take effect as an executory devise? or whether it shall be taken as a contingent remainder, and consequently void for want of a particular estate to support it, by reason of Samuel's death in the testator's lifetime, and that John Hopkins had no son *in esse* at the testator's death, in whom the remainder might vest? The next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until John Hopkins has a son? As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed, that if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder, by reason of Samuel's estate, which would have supported it: so is the case of *Purefoy* v. *Rogers*, 2 Saund. 380, 388, and limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders. So on the other hand, it is likewise clear, that had there been no such limitation to Samuel and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it; and consequently not able to inure as a remainder: so that it must be the intervening accident of Samuel's death in the testator's lifetime, upon which this point must depend. And as to that, I am of opinion that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or *feme covert* make a will, and do not act either at

full age or after the coverture determined, to revoke this will, yet the will is void; because the time of making is principally to be considered; and the law judges them incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death, no after-purchased lands shall pass without a republication: which was the case of *Bunter* v. *Cook*, 1 Salk. 237, because the time of the will made is chiefly to be regarded. Indeed it is possible that subsequent things may happen to alter the testator's intent; but unless that alteration be declared, no court can take notice of his private intent, not manifested by any revocation of the former; though these subsequent accidents may and must, in many cases, have an operation upon the will; as in the case of *Fuller* v. *Fuller*, Cro. Eliz. 422, and *Hutton and Simpson*, 2 Vern. 722. And in the *Lord Landsdown's Case*, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will made and the testator's death; and the words there, *for want of such issue*, were not construed to create another estate tail to postpone the limitation, but only to convert the second estate to the precedent limitation. So we see, that in these cases the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired; but to let it work as far as it can. And if, in this case, we consider it as an executory devise, the intent will be served in case John Hopkins has a second son; but if it is taken as a remainder, the intent plainly appearing that a second son of John Hopkins should take, is quite destroyed; there being no precedent estate to support it as a remainder. The very being of executory devises shows a strong inclination, both in the courts of law and equity, to support the testator's intent, as far as possible: — and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature, that have been adjudged. And if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In *Pay's Case*, Cro. Eliz. 878, had the testator lived to Michaelmas, the limitation had been a remainder; and if a remainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where by the testator's death before Michaelmas, what would otherwise have been a remainder, was held to be good by way of executory devise? I think, that in this case the limitation would operate as an executory devise, if it was of a legal estate; and therefore shall do so as a trust, the rules being the same.

The next question is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth of a son to John Hopkins? And this must depend upon the wording of the proviso. The words are, "That none of the persons to whom the estates

are limited shall be in the actual possession and enjoyment of the rents and profits until they shall respectively attain the age of twenty-one; and that in the mean time the trustees shall make such allowance thereout as they shall think suitable; and then he wills, that the overplus of such rents and profits do go to such persons as shall be entitled unto, and come to the actual possession of his estate," &c. By which words none are affected but such as are to come to the estate under the limitations. It restrains them from having anything to do with the estate till they attain the age of twenty-one, and provides the surplus (beyond their allowance) to be laid up for them; but here is no provision made what shall become of those rents and profits until a son be born. The words *in the mean time* have been differently construed: and it was said, that there was no certain *terminus a quo*, from whence they should begin. Had Samuel lived, the *terminus* must have been from the time of the limitation taking place; and so it must be *toties quoties* any come to be entitled to this estate under the several limitations: but until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir-at-law; the case being the same where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir-at-law. So it was held by the Lord King in the case of *Lord and Lady Hertford* v. *Lord Weymouth;* which shows that equity follows the law.

One objection indeed has been made, which is, that the testator having in this case devised another estate to John Hopkins his heir-at law, can never be supposed to have intended him this surplus. And to warrant that objection, the case of *North and Crompton*, 1 Chan. Ca. 196, has been cited. I answer, that in these cases the heir does not take, by reason of the testator's intent being one way or the other; but the law throws it upon him: and wherever the testator has not disposed (be his intent that the heir should take or not take), yet still he shall take: for somebody must take; and none being appointed by the testator, the law throws it upon the heir.

And so affirmed the decree, and ordered the personal estate (which was of very great value) to be laid out in land, and settled to the same uses as the real estate, according to the direction of the will.

DOE d. HERBERT *v.* SELBY.

King's Bench. 1824.

[*Reported* 2 *B. & C.* 926.]

Ejectment, for messuages and premises in the parish of St. Leonard's, Shoreditch, in the county of Middlesex. The declaration con-

tained counts, first on a demise of the entirety by Thomas Herbert, James Southern, and Ann, his wife (in right of the said Ann), and William Duke, the 1st of January, 1821; secondly, on the demise of an undivided third by Thomas Herbert, same day; thirdly, on the demise of an undivided third by James Southern and Ann, his wife (in right of the said Ann), same day; fourthly, on the demise of an undivided third, by William Duke, same day. Plea, General issue. At the trial before *Abbott*, C. J., at the Middlesex sittings after last Easter Term, a verdict was found for the plaintiff, subject to the opinion of the court, on the following case:—

Thomas Herbert, being seised in fee of the premises in question, made his will, duly executed and attested, so as to pass real estates, containing as follows, *inter alia:* "I give and devise unto my said son, George Herbert, two freehold houses in Burdett's Buildings, Hoxton, in the parish of St. Leonard's, Shoreditch, aforesaid, in the occupation of William Ames and Tabitha Kenner, also, &c. (certain other premises particularly described in the will), to hold to him, my said son George, for and during the term of his natural life; and from and after his decease, I give and devise the same estates unto all and every the child and children of my said son George, lawfully to be begotten, and their heirs forever, to hold as tenants in common and not as joint tenants. But if my said son George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue; then I give and devise the same estates unto my said son Thomas, my daughter, Ann Southern, and my son-in-law, William Duke, and their heirs forever, to hold as tenants in common, and not as joint tenants." After the death of the testator George Herbert suffered a recovery to the use of himself in fee, and afterwards by lease and release conveyed the premises to the defendant in fee. In January, 1818, the said George Herbert died unmarried without having had issue, leaving the said Thomas Herbert, Ann Southern, then and still the wife of the said James Southern, and William Duke, named in the said will, him surviving.

Chitty, for the plaintiff.

Campbell, contra, was stopped by the court.

Bayley, J. There are two modern cases which are quite decisive of the present question, *Doe* v. *Burnsall*, 6 T. R. 30, and *Crump* v. *Norwood*, 7 Taunt. 362. The present question arises upon a will, whereby the property was given to the testator's son, George Herbert, for life, and from and after his decease, to all and every the child and children of George and their heirs forever; but if George should die without issue, or leaving issue, and such child or children should die before attaining the age of twenty-one years, or without lawful issue, then to the lessors of the plaintiff, two of whom were children of the testator. It is not contended that George took an estate tail; and, indeed, *Goodright* v. *Dunham*, 1 Doug. 264, clearly shows that he took for life only, and that his children would take as purchasers

by way of remainder, and they would take in fee. It has been contended that the ultimate devisees took either by way of executory devise or vested remainder. But it is clear, that where a devise may operate as a contingent remainder, it cannot be considered as an executory devise. If a fee be given by way of vested limitation, but determinable, a remainder after that must be an executory devise; but if a fee is limited in contingency, and upon failure of that the estate is given over, that is a contingency with a double aspect: and if the estate vests in the one, it cannot in the other, *Loddington* v. *Kime*, 3 Lev. 431. But it may happen that an estate may be devised over in either of two events; and that in one event the devise may operate as a contingent remainder, in the other as an executory devise. Thus if George had left a child, a determinable fee would have vested in that child, and then the devise over could only have operated as an executory devise. But George having died without having had a child, the first fee never vested, and the remainder over continued a contingent remainder. *Gulliver* v. *Wickett*, 1 Wils. 105, was clearly a case of executory devise. The estate was given to testator's wife for life, and after her death to such child as she was then supposed to be enseint with, and to the heirs of such child forever; provided, that if such child shall die before twenty-one, leaving no issue of its body, then the reversion over. The description of the child there was a clear *designatio personæ* and as a child *in ventre sa mere* is for many purposes considered as *in esse*, the first remainder, a fee determinable was vested in that child, and the remainder over could only operate by way of executory devise. The other cases which I have mentioned are not in substance distinguishable from this. *Doe* v. *Burnsall* was a devise to Mary Owstwhick, and the issue of her body as tenants in common; but in default of such issue, or being such, if they should all die under twenty-one, and without leaving any lawful issue of their bodies, then over. Mary Owstwhick suffered a recovery, and died without having had any issue, and it was held that all the limitations subsequent to that to her were contingent, and destroyed by the recovery. No question was raised as to ultimate remainder operating by way of executory devise, but that could not be raised, as Mary Owstwhick never had any issue in whom the first remainder might vest. But *Crump d. Wooley* v. *Norwood* is on all fours with the present case. There the devise was to the testator's wife for life, if she should so long remain unmarried, and immediately after her decease or marriage, to testator's three nephews, share and share alike, for life, as tenants in common, remainder to the heirs of their bodies respectively in fee; if more than one, then to all equally, as tenants in common; "and if any of his said nephews should die, leaving no such issue, or leaving any such, they should all die without attaining the age of twenty-one years, then over;" and it was held, that the remainders, subsequent to the devise to the nephews, were contingent, and defeated by the destruction of the particular estate. And one of the nephews having died without having had issue,

Gibbs, C. J., considered that in that event the question of executory devise did not arise; although if there had been issue, the ultimate devise over might have operated in that mode. These authorities satisfy me, that in the event which has happened, the devise to the lessors of the plaintiff in this case did not operate by way of executory devise. It has been argued, that it might operate as a vested remainder, for that the devise to George's children was only of an estate tail, because they could never die without heirs as long as the lessors of the plaintiff lived, and, therefore, "heirs" must mean "heirs of the body." But although it may be so where, after a devise to a man and his heirs, the estate is devised over *simpliciter* to a collateral heir, yet it is not so where the limitation over depends upon the party dying within a limited time. Upon the whole, I am of opinion that George Herbert took an estate for life only, and that his children, if there had been any, would have taken a fee; but in the event of there not being any, which is the event that has happened, the remainder over was given by way of contingent remainder, and was defeated by the destruction of the particular estate. Our judgment must, therefore, be for the defendant.

Holroyd, J. Under the will in question George took an estate for life, and his children in fee. In the event of his having no children, the devise over would operate as a contingent remainder; but if he had children, then it could only take effect as an executory devise. That it was not an executory devise, in the event that has happened, is clearly proved by the cases which my Brother Bayley has cited; and the language of Gibbs, C. J., in *Crump* v. *Norwood* is peculiarly applicable. Here the estate is given over on either of two contingencies, one of them George's dying without children; that has happened, and upon that the remainder over would, if at all, take effect as a contingent remainder. But the particular estate having been previously destroyed, the contingent remainder was thereby defeated.

Littledale, J. The principles applicable to this case were fully considered in *Crump* v. *Norwood*, which cannot be distinguished from it. *Doe* v. *Burnsall* is also in point. It is true that in that case the words were "if all such issue should die under twenty-one *and* without issue;" but here the word *or* must be read *and;* and although the point of the executory devise was not there agitated, yet Gibbs, C. J., thought it an express authority for his judgment in *Crump* v. *Norwood*, where it was raised. Upon these authorities it seems to me clear that the lessors of the plaintiff cannot recover.

Judgment for the defendant.[1]

[1] See *Hasker* v. *Sutton*, 1 Bing. 500.

It was afterwards discovered that Thomas Herbert was heir-at-law of the testator, and a fresh ejectment was brought, the court having refused to grant a new trial in this case. — Rep.

DOE d. HARRIS *v.* HOWELL.

King's Bench. 1829.

[*Reported* 10 *B. & C.* 191.]

Bayley, J., delivered the judgment of the court.[1] This case was founded upon the will of John Ley. By that will he devised to his daughter Elizabeth, the wife of William Harris, for life, remainder to William Harris for life, remainder to John, his daughter's son, and his heirs and assigns forever; but in case he should die before the testator's daughter, Elizabeth Harris, and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person or persons as she should think proper. The testator died in February, 1763, and John, the daughter's son, in April following. In January, 1766, the daughter had another son, William, the lessor of the plaintiff. In November, 1770, William Harris died; and in December, 1772, his widow married again. In Hilary Term, 1773, she and her second husband levied a fine with proclamations of the premises in question; and the case depends upon the effect of that fine. If that fine barred the lessor of the plaintiff, the defendant is entitled to the property; if it did not bar him, the property is his. In May, 1819, the testator's daughter Elizabeth died, and a proper entry was made to avoid the fine. The daughter was John Ley's heir. At the time, therefore, when the fine was levied (John, the devisee in fee, being dead, and William Harris being dead), the only parts of the will which continued capable of operating were the devise to the daughter for life, and the devise over in case she should have no other child living at her death, that she might give and devise the property as she should think proper.

The question whether the plaintiff's title is barred by the fine levied by his mother, Elizabeth, depends upon the quality and character of the power given to her by the will to give and devise the premises after her own death, in case she shall have no other child living at her death. If this be considered as an executory devise, the fine did not bar it; and the lessor of the plaintiff is entitled to recover. If it be considered as a contingent remainder, it was defeated by the fine.

It is a maxim of law, that no limitation shall be considered as an executory devise which may be good as a remainder, the law favoring the alienation of property. In the present case, it is clear that at the death of the testator, and until the death of his grandson John, this limitation could avail only as an executory devise; and this not for want of a freehold interest to support it, but by reason of the previous gift of the whole fee to the testator's grandson John, if he had survived

[1] The opinion only is here given.

his mother. Upon the death of John, this necessity and the reason of it ceased, and the lands then stood limited to Elizabeth for life, remainder to her husband for life, with a power to her to give and devise the fee if she should have no other child living at her death. In this state of facts, therefore (that is, upon the death of John), we think the character and quality of this limitation changed, and it became a contingent remainder. This appears to us to be conformable to the principle upon which executory devises are allowed; viz., the necessity to give effect to the intention of a testator.

In *Stephens* v. *Stephens*, Cas. temp. Talb. 228; Fearne, 519, the testator devised to his grandson William Stephens, his heirs and assigns forever (after the death of the testator's wife), but if William should die under twenty-one, to his grandson Thomas and his heirs; but if he should die under twenty-one, to such other son of the father and mother of William and Thomas as should attain twenty-one, in tail male, remainder to the daughters of their father and mother in tail general, remainder to Sir Richard Stephens in fee. William and Thomas both died under twenty-one; their father and mother had another son and daughter, Sarah and Thomas; and it was held by the Court of King's Bench, Lord Hardwicke then being Chief Justice, that the limitation to such other son as the father and mother of William and Thomas should have (there being no freehold to support it) was good by way of executory devise; and that if the limitation to their sons and daughters in tail should fail, the estate would go to Sir Richard Stephens, by virtue of the remainder to him in fee. Lord Chancellor Talbot decreed according to this decision, and expressed his satisfaction with it as agreeing with his own sentiments. Mr. Fearne observes upon this case, that until the estate vested in some son (of the father and mother of William and Thomas) who attained twenty-one, the limitations over to the daughter and Sir Richard Stephens must have been executory devises; but as soon as ever the estate should become vested in a son, then those subsequent limitations must, of course, have taken effect as vested remainders. In *Hopkins* v. *Hopkins*, Cas. temp. Talb. 44, Fearne, 304, 525, there was a devise in trust for B. for life, remainder to his first and other sons successively in tail male, remainder to the future sons of C. successively for life, remainder over. B. died in the life of the testator, and C. had no other son until some time after the testator died; it was held that if the fee had not been in the trustees, B.'s death in the testator's lifetime would have made the limitations to the future sons of C. executory devises; but that as soon as C. had another son and the executory devise having thereby vested, the subsequent limitations would have ceased to have been executory devises, and would have been contingent remainders; but C.'s son having died before any other estate vested, and the question being raised, Whether the limitations over, prior to D.'s, were not destroyed? it was decreed by Lord Chancellor Talbot that the legal estate was in the trustees, and protected those which would otherwise have been contingent remainders,

from destruction; and that decision was afterwards acted upon by Lord Hardwicke. That case, therefore, shows that limitations, which had previously been considered as executory devises, by the birth of a son (intended to be the first taker), became contingent remainders. And if an executory devise shall become a contingent remainder by the birth (of a person capable of taking) happening after the death of the testator, the same change must, by parity of reason, take place on the death of the person whose interest alone caused the limitation to be considered as an executory devise.

That a limitation in a will which, at the time of making it, could only have operated by way of executory devise, may, by change of circumstances in the testator's lifetime, operate at his death so as to give a vested estate in possession, or a vested remainder, or a contingent remainder liable to destruction, is laid down distinctly by Mr. Preston in his book upon Abstracts, vol. ii. p. 154, and it will be found upon examination that a change of circumstances after the testator's death, may change the character of a particular limitation, and make it operate at one time as a remainder, at another as an executory devise, and *e converso* at one time as an executory devise, at another as a remainder.

And in Fearne's Essay on Contingent Remainders abundant proof will be found that where a limitation, which causes subsequent limitations to operate by way of executory devises, is removed, the subsequent limitations, if they do not give an estate in possession, will operate either by way of vested or contingent remainder, as they would have done had that limitation which made the others operate by way of executory devise never existed. In page 506 Mr. Fearne says, "But here an observation is to be attended to, that notwithstanding the rule that if one limitation be executory, every subsequent one must be so likewise, yet a preceding executory limitation may be uncertain and contingent, when a subsequent one may be so limited as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest; should the preceding limitation fail, the subsequent one will then vest in possession; should it take effect, the subsequent one will at the same instant vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction as other remainders of the same kind are subject to. And in addition to the cases I have mentioned of *Hopkins* v. *Hopkins*, and *Stephens* v. *Stephens*, Mr. Fearne adduces in different parts of his work, in illustration of the same doctrine, the cases of *Brownsward* v. *Edwards*, 2 Ves. 243, and *Gulliver* v. *Wickett*, 1 Wils. 105.

In *Gulliver* v. *Wickett*, the testator devised to his wife for life, remainder to the child his wife was then supposed to be pregnant with, and his heirs; but if he should die under twenty-one and without issue, then to B. and his heirs. This was held to be a good devise to the wife for life, with contingent remainder to the child in fee; with a good exe-

cutory devise to B. in fee; and if the contingency of a child never happened, that the remainder to B. would take effect upon the death of the wife; and it will be seen that it would take effect as *an ordinary remainder*.

In *Brownsward* v. *Edwards*, 2 Ves. 243, Fearne, 506, where an estate was devised to B. and the heirs of his body if he attained twenty-one, but if he died under twenty-one, and (construed "or") without issue, and he attained twenty-one, but died without issue, Lord Hardwicke held that the remainder over would have inured by way of executory devise had B. died without issue under twenty-one; yet as he did not die till after the estate vested in him, the limitation over went by way of remainder.

From these authorities we think it clear that a change of circumstances after the death of the testator may convert into a remainder what at the death of the testator and without such change could only have operated by way of executory devise, and that this will be the case where that limitation which alone would make the others executory devises is become incapable of taking effect; and if this be so, this case is clear, for at the time this fine was levied, the only vested estate was in Elizabeth, the testator's daughter, and her husband in her right, and the only other interest was a contingent remainder in favor of any child or children she should leave at her death, and that remainder the fine destroyed. For these reasons, we think the verdict must be entered for the defendants, according to the reservation in the case.

Postea to the defendant.[1]

Busby, for the plaintiff.
Shutt, contra.

GATENBY *v.* MORGAN.

QUEEN'S BENCH DIVISION. 1876.

[*Reported* 1 *Q. B. D.* 685.]

STATEMENT OF CLAIM. Paul Cook, late of Whitby, in the county of York, duly executed his last will, dated the 5th of April, 1811, and thereby devised unto his wife, so long as she remained his widow and unmarried, a dwelling-house, with the gardens and appurtenances (then in the testator's occupation), situate in Flowergate, in Whitby, and devised all his messuages, farms, land, and hereditaments called Mortar Pits, and from and immediately after his said wife's decease, the above-mentioned dwelling-house, with the gardens and appurtenances, unto and to the use of his son Paul Cook and his heirs. But if it so happened that his son Paul Cook departed this life without leaving any issue lawfully begotten at his death living, then and in that case, from and immediately after his said son's decease, the testator devised the

[1] See *Doe* d. *Fonnerau* v. *Fonnerau*, Doug. 487 (1780).

said Mortar Pits and the said dwelling-house, with the gardens and appurtenances, unto and to the use of his granddaughter Eleanor Cook and her heirs. But if it so happened that his said granddaughter departed this life without leaving any issue lawfully begotten at her death living, then and in that case, immediately after his said granddaughter's decease, the testator devised the said Mortar Pits and the said dwelling-house, with the gardens and appurtenances, unto and to the use of the nine children then living of his son-in-law John Atkinson, to be equally divided among them share and share alike. And the testator devised and gave all the rest, residue, and remainder of his estate and effects whatsoever, after payment of his just debts and funeral and testamentary expenses, unto his son Paul Cook.

The testator died on the 20th of July, 1811, being at the time of his death seised in fee of the dwelling-house, with the gardens and appurtenances, and of the Mortar Pits.

Isabella Cook remained the widow of the testator and unmarried until her death on the 1st of November, 1825.

Paul Cook, the son of the testator, died on the 10th of February, 1834, without leaving any issue lawfully begotten at his death living. He duly executed his will, dated the 21st of April, 1831, and devised all his real and personal estate to the use of his wife, Emma Cook, her heirs, executors, administrators, and assigns.

Emma Cook duly executed her will, dated the 17th of August, 1849, and devised the Mortar Pits and the dwelling-house, with the gardens and appurtenances, to the use of the plaintiff, Catherine Cook Gatenby, her heirs, executors, administrators, and assigns absolutely; and died on the 30th of March, 1852.

The testator's granddaughter Eleanor Cook intermarried with Edward Ridley, and died, without leaving any issue lawfully begotten at her death living, on the 30th of September, 1868.

Eight of the nine children of the testator's son-in-law John Atkinson died before Eleanor Cook (or Ridley). Some of them left issue.

The ninth child, Sarah Atkinson, died without issue on the 1st of May, 1872.

The plaintiff, Catherine Cook Gatenby, claims possession of the Mortar Pits and the dwelling-house, with the gardens and appurtenances, as the devisee of Emma Cook.

The other five plaintiffs are the respective heirs-at-law of the nine children, and claim possession of the premises under the devise to the nine children of John Atkinson in the will of the first testator, Paul Cook.

Demurrer, on the ground that the statement of claim shows no title in any of the plaintiffs. Joinder.

Manisty, Q. C. (with him *Forbes*), in support of the demurrer.

Beresford (with him *Herschell*, Q. C.), for the plaintiffs.

BLACKBURN, J. When the facts are understood, it seems pretty clear on the authorities that the plaintiffs have not shown any title in any of

them under the will of the testator. The will was made in 1811, and at that time it had been well established that the heir-at-law was not to be disinherited without a manifest intention on the part of the testator. Accordingly, unless there were words of inheritance, or words manifesting an intention that the devisee should take the whole estate, the devisee was held to take only a life estate, although in the majority of cases such a construction probably defeated the real intention of the testator. And accordingly, by the New Wills Act, the rule was reversed, and the contrary construction is to prevail, — the devisee takes the inheritance, unless there is something to show the contrary intention.

In the present case the will was before the Wills Act, and it must be decided by the old rule. There being no words of inheritance, is there anything to show an intention that the devisees should take more than a life estate in the words of this devise "unto the use of the nine children of my son-in-law John Atkinson, to be equally divided among them, share and share alike"? I do not think there is according to the authorities. There is one case, *Oates* v. *Brydon*, 3 Burr. 1895, which seems an authority to the contrary, and which seems to have proceeded on the assumption that, if property is "to be divided" amongst the devisees, that is sufficient to show an intention to give them the whole estate; and, at all events, Lord Mansfield held that it showed an intention that the property should be sold, and the whole proceeds divided among the devisees. But I do not think the principle satisfactory; and moreover, in *Goodtitle* v. *Edmonds*, 7 T. R. 635, Lord Kenyon said the case was immediately disapproved of, and explains that Lord Mansfield proceeded on the ground of the smallness of the property, and did not adhere to his decision in subsequent cases. Consequently, on the authorities, the nine children of Atkinson took only life estates, leaving the fee in some one else after the termination of the life estates.

That brings me to the question whether the remaining plaintiff, Catherine Cook Gatenby, has made out a title. She claims as devisee of Emma Cook, who was devisee of all the estate of Paul Cook, and he was devisee of the residue of the estate under the will of the original testator, and also his heir-at-law. What was the effect of the different clauses in the will as to this property? The testator devised it in fee to his son Paul Cook, but with an executory devise over that, if Paul Cook died without issue living at his death, then the property should go to the testator's granddaughter Eleanor Cook and her heirs; and then there is a further executory devise over, in the event of Eleanor Cook dying without issue living at her death, to the use of the nine children of Atkinson, "to be equally divided among them, share and share alike." This, as I have already said, gives them only an estate for life; and the question is whether, there being one of those children living at the death of Eleanor Cook without issue, the estate of Eleanor Cook wholly ceased, and on the death of the last of the tenants for life,

the reversion of the estate passed to Paul Cook as heir-at-law or devisee of the residue; or whether the remainder of the estate reverted to the heirs of Eleanor Cook, under the devise in fee to her, this estate being only so far defeated as to let in the life estate. I am of opinion that the latter is the true construction.

In *Jackson* v. *Noble*, 2 Keen, 590, there was a similar devise of an equitable fee to the testator's daughter, who became Mrs. Noble, with (precisely as here) an executory devise over, which became impossible to take effect, owing to the death of the devisees in the lifetime of Mrs. Noble, and Lord Langdale, M. R., held that Mrs. Noble took the absolute fee simple. That is not precisely this case; because here one of the children who had a life interest survived Eleanor Cook. But can this make any difference? The estate devised to Eleanor Cook was in fee, and at her death was not divested, but survived to her heirs, with the existing devise over, still only a devise for life, interposed, and taking place on the event of her death without issue. In 2 Powell on Devises, 3d ed. by Jarman, page 240, it is said: "Where an estate is limited in derogation of a preceding estate, and to a partial though not total exclusion of the same, — as where a testator devised lands to his son B. in fee, and other lands to his son C. in fee, subject to a proviso that if either of his sons should die before marriage or before twenty-one, and without issue of their bodies, then he gave all the lands of such of his sons as should so die, &c., unto such of his said two sons as should the other survive, — it was held that the sons took the fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under twenty-one, and without issue; and that, one of them having attained twenty-one and died unmarried, the survivor was entitled to his moiety for life:" citing *Hanbury* v. *Cockerell*, 1 Roll. Abr. 835–836. Then the author points out that, "Mr. Preston" (a high authority) "considers that the executory devise did not wholly defeat the original devise to the sons, but only introduced the limitation to the surviving son of an estate for life by way of exception out of the preceding estate in fee. To this important rule, namely, that an estate subject to an executory devise, to arise on a given event, is, on the happening of that event, defeated only to the extent of the executory interest, the only possible objection that can be advanced is the total absence of direct authority for it; for the books do not furnish a single example of its application." He then proceeds to point out that the point did not arise in *Hanbury* v. *Cockerell*, and in another case in which it might have arisen. But, surely, if the only possible objection is the want of direct authority, reason and common-sense ought to be enough to decide the point. It is further pointed out in Powell on Devises "that Mr. Fearne's position, 1 C. R. 251, 538, 'that a condition or limitation must determine or avoid the whole of the estate to which it is annexed, and not determine it in part only, and leave it good for the remainder,' must be received with some qualification." Fearne seems to be speaking of a condition or limitation at common law, and

not of an executory devise. And I can see no reason why an executory devise should on the happening of the event defeat the estate originally devised to a greater extent than the executory interest itself. There is no direct authority either for or against it; and I think we ought to act on Mr. Preston's view, supported as it seems to me by common-sense and reason. That being so, Eleanor Cook and her heirs retained their interest in the remainder, and became entitled in possession after the death of the surviving tenant for life; and therefore none of the plaintiffs have made out a title; and judgment must be for the defendants.

Lush, J. I am of the same opinion. The rule of construction before the Wills Act was, that a devise, without words of inheritance, or words clearly implying an intention to give the inheritance, passed only an estate for life. *Oates* v. *Brydon* is inconsistent with this rule, no doubt, but it has been virtually overruled. Therefore the executory devise to the nine children of Atkinson gave them a life estate only. What was the effect of that executory devise upon the preceding devise in fee to Eleanor Cook? Common-sense would say, just so much as the subsequent devise required, and no more; that would leave the fee in Eleanor Cook's heirs, subject after her death without issue to the life estates of the children of Atkinson. The case of *Watkins* v. *Weston*, 3 D. J. & S. 434; 32 L. J. (Ch.) 609, and more directly, *Jackson* v. *Noble*, supports this view. The true rule seems to be that the executory devise takes away from the previous estate in fee only so much as is necessary for the executory devise itself; and after the death of the surviving tenant for life the estate reverts to the heirs of the previous devisee in fee.

Field, J. I agree that judgment should be for the defendants, on the grounds stated by my learned Brothers.

Judgment for the defendants.[1]

[1] *Contra*, by three judges to two. *Doe* d. *Harrington* v. *Gill*, 1 Houst. 398 (1857).

Note. — An executory devise does not merge in the fee upon which it is limited, though they belong to the same person. *Goodtitle* v. *White*, 15 East, 174 (1812).

On gifts over of "what remains" after an absolute interest has been given, see Gray, Restraints on Alienation, §§ 57–74.

SECTION II.

FAILURE OF EXECUTORY DEVISE OR BEQUEST.

HARRISON *v.* FOREMAN.

CHANCERY. 1800.

[*Reported* 5 *Ves.* 207.]

JOHN STALLARD, being possessed among other personal estate of £566 annuities of 1778, by his will dated the 13th of August, 1779, gave to Joseph Jennings and John Harrison £40 per annum, part of the said annuities, in trust to pay the dividends and produce thereof, which should from time to time arise and become payable, to his cousin Mrs. Sarah Barnes during her life, exclusive of her marriage or any future husband, and not to be subject to his or their debts or control; and from and after her decease upon trust to transfer the said sum of £40 per annum, or the stock or fund, wherein the produce thereof might be invested, to Peter Stallard and Susannah Snell Stallard, children of his (the testator's) cousin William Stallard, in equal moieties; and in case of the decease of either of them in the lifetime of the said Sarah Barnes, then he gave the whole thereof to the survivor of them living at her decease. He gave all the residue of his estate and effects of every kind to Elizabeth Stallard and Sarah Stallard, the children of his cousin Abraham Stallard, to be equally divided between them, share and share alike; and he appointed Jennings and Harrison his executors.

By a codicil, dated the 2d of February, 1781, among other things the testator revoked the disposition of the residue, and gave it in the same terms to the said Elizabeth Stallard and Sarah Stallard, and Mary Main, sen., and Mary Main, jun., equally.

By another codicil, dated 9th of February, 1782, the testator, taking notice of the death of Jennings, appointed another joint-executor with Harrison.

The testator died in March, 1782. Susannah Snell Stallard and Peter Stallard died, the former in January, 1784, the latter in December in the same year; both intestate. Sarah Barnes died in January, 1797. The bill was filed by the executors of the testator; praying that it may be declared, who are entitled to the said £40 per annum, annuities, &c. The question was between the defendant Foreman, administratrix of Susannah Snell Stallard and Peter Stallard, and the residuary legatees, claiming it as having fallen into the residue.

Mr. Hood, for the defendant.

Mr. Stanley, for the residuary legatees.

MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] The only question upon this will is, whether by the event, that has happened, the deaths of Susannah Snell Stallard and Peter Stallard in the life of Sarah Barnes, this sum of £40 per annum annuities given after her death in their favor is undisposed of; or in other words whether the bequest is by these means put an end to and become absolutely void. Upon the first part of the will, if it stood without the condition annexed in case of the death of either of them in the lifetime of Sarah Barnes, there could be no doubt, I suppose, that it would have been a vested interest in those two persons; for it is a bequest of these annuities to a person during her life; and after her decease to two given persons in equal moieties. If it rested upon those words, there could be no doubt it would upon the death of that person have been a vested interest in them as tenants in common, transmissible to their representatives, whether they survived the person entitled for life, or died before her. Then comes the condition annexed; making a disposition in a given event different from that which would have been the effect of the first words. The contingency described in that part of the will never took place; there being no survivor of those two persons at that time. The question is, then, whether this makes the whole void; as if it never vested at all.

It is perfectly clear, that where there are clear words of gift, giving a vested interest to parties, the court will never permit that absolute gift to be defeated, unless it is perfectly clear, that the very case has happened, in which it is declared, that interest shall not arise. The case of *Mackell* v. *Winter* [3 Ves. Jr. 236, 536], is most analogous to this. I held the interest absolutely vested in the surviving grandson. My decree was reversed: the Lord Chancellor holding two things; in both of which I had given an opinion; first, that it never did vest in the two grandsons or the survivor of them: 2dly, If it did vest, yet it sufficiently appeared upon the will, that the testator intended a survivorship to take place between all three, the grandsons and the granddaughter, though it was not expressed. As to the first point, it does not bear upon this case. The Lord Chancellor was of opinion, the words were not sufficient to give a vested interest to the two grandsons for this reason; that nothing was given to them till their ages of twenty-one: but the capital and the accumulation are directed to be paid to them at that time and no other. His Lordship's opinion is expressly founded upon that. My opinion rested entirely upon the first point. I admit the absurdity of the intention: but that is no reason why it should not prevail. I am very glad the decree took the turn it did; for unquestionably it effected the real intention of the testatrix.

But without entering into that question, or commenting farther upon that case, to which it is my duty to submit, it is sufficient to say, that it is impossible any doubt can be entertained upon the words of this will. Upon the principle of the Lord Chancellor's opinion, that the words in that will were not sufficient to give any vested interest till

the attainment of majority, my decree undoubtedly was wrong. But upon the doctrine held both by his Lordship and by me it must be determined, that upon the words of this will there was a vested interest, that was to be devested only upon a given contingency, and the question only is, whether that contingency has happened. No words can be more clear for a vested interest. Then the rule that I applied in *Mackell* v. *Winter*, and that was admitted by the Lord Chancellor, takes place; that if there is a clear vested interest, the court is only to see, what there is to take it away; and the only contingency is, that in case of the decease of either of them in the life of Mrs. Barnes the whole is to go to the survivor. Neither of them was living at her death. That rule, therefore, that I applied in *Mackell* v. *Winter*, and that I still think binding upon a court of equity, applies. There is a vested interest; and the contingency, upon which it is to be devested, never happened: the vested interest therefore remains; as if that contingency had never been annexed to it. Upon the principles laid down by the Lord Chancellor in *Mackell* v. *Winter* I am perfectly clear, his Lordship would have agreed with me in this case. I could illustrate the principle by putting the case of a real estate, instead of these annuities, given after the death of the tenant for life to these two persons and their heirs, as tenants in common; but, if either of them dies before the death of the tenant for life, then to the survivor and his heirs. Putting it so, there is no possibility of doubt, it would have been a vested interest in them, to be devested upon a contingency, which did not take place.

It is unnecessary for me to take notice of that case of *Allen* v. *Barnes*, as I have elsewhere [*Perry* v. *Woods*, 3 Ves. Jr. 204, 208] observed, that it is not correctly reported.

Declare, that these annuities of £40 per annum were a vested interest in Susannah Snell Stallard and Peter Stallard, and now belong to the defendants Foreman and his wife in right of the latter as their administratrix.[1]

[1] Bequest to the testator's wife for life; and after her death the capital to be divided between the testator's brothers and sisters in equal shares; but in case of the death of any of them in the lifetime of the wife, his or her shares to be divided between all his or her children. *Held*, that the representative of a brother who had died in the wife's lifetime without issue was entitled. *Smither* v. *Willock*, 9 Ves. 233 (1804).

Bequest of interest and dividends of personal property to A. for life, and on her death the same to be equally divided among her children, or such of them as should be living at her death. A.'s children all died before her. *Held*, that they all took vested interests which had not been divested. *Sturgess* v. *Pearson*, 4 Mad. 411 (1819).

See also *Norman* v. *Kynaston*, 3 De G. F. & J. 29 (1861); *Crozier* v. *Crozier*, L. R. 15 Eq. 232 (1873).

JACKSON *v.* NOBLE.

CHANCERY. 1838.

[*Reported* 2 *Keen*, 590.]

THIS was a bill filed by Mary Anne Jackson and others, against Mary Ann Noble and Edward Leslie, praying that the wills of David Russen, George William Russen, and Jane Russen, might be established, and that the rights of the parties to certain property given by the will of David Russen to the defendant, Mary Ann Noble, might be declared, and that consequential relief might be given.[1]

On the 29th October, 1813, David Russen made his will, and thereby, after giving to his son, George William Russen, certain leasehold estates and his money in the funds, with certain exceptions, gave and bequeathed as follows: "And I do hereby give, devise, and bequeath, all those my freehold estates, situate and being in Upton Lane, Westham, in the county of Essex, in the possession of Mr. Clark: also my freehold estate situate in Golden Lane, in the city of London, in the possession of Mrs. Snell and Mr. Sandover: also my moiety or half part of my copyhold messuage or tenement, garden and premises, situate at Westham, in the county of Essex, in the possession of Mr. Stuart, and which said estate I have surrendered to the use of this my will: also my leasehold estate, situate and being in Philip Lane, in the city of London, in the possession of Mr. Thomson; and £1,000 3 per cent stock unto my daughter Mary Ann Russen, and Matthew Peter Davies, of Saint Martin's Le Grand, and George William Russen, of Aldersgate Street, gentleman, their heirs, executors, administrators, and assigns, to have and to hold the said last-mentioned freehold and leasehold messuages, tenements, estates, and premises, with their several and respective appurtenances, and the aforesaid £1,000 stock, unto my said daughter Mary Ann Russen, the said Matthew Peter Davies, and George William Russen, their heirs, executors, administrators, and assigns, for and according to my several estates, right, interest, and term of years therein respectively. In trust to permit and suffer my said daughter, M. A. Russen, and her assigns, to receive and take the interest and dividends of the said £1,000 stock, and the rents, issues, and profits of the said several last-mentioned estates, for and during the term of her natural life, to and for her own separate, personal, and peculiar use and benefit, independent of any husband, with whom my said daughter shall or may at any time or times hereafter intermarry; and not be subject to his or their debts, powers, control, engagement, or intermeddling; and for which her receipts alone shall from time to time, and at all times hereafter, be full,

[1] Only that part of the case which relates to the effect of the executory gift is here given.

good, and sufficient discharges, notwithstanding any such coverture, in such and the like manner as if she had continued a feme sole and unmarried, and that to all intents and purposes whatsoever. And from and after the decease of my said daughter, in trust to convey and assign the said several last-mentioned freehold and leasehold estates, and the said £1,000 stock, unto the heirs, executors, and assigns of my said daughter, for and according to all my estate and right therein respectively. Nevertheless, in case my said daughter shall intermarry and have no child or children, then the said estates and money in the funds shall belong to my son George William Russen; or in case of his decease before my said daughter, then to such child or children as he may happen to have;" and after enabling his daughter to grant leases of the freehold and leasehold estates so given to her, and giving certain other legacies, he gave all the residue of his estate to his son George William Russen.

By a codicil the testator gave to his daughter, Mary Ann Russen, a further sum of £1,000 3 per cent reduced annuities, subject to the like terms and conditions as before mentioned and described in his will.

The testator died on the 6th of February, 1819. He left his son George William Russen his heir-at-law and customary heir, and his daughter Mary Ann Russen surviving. The son George William Russen proved the will, and became legal personal representative.

He died without issue, having made a will, dated the 28th February, 1833, by the recital of which he showed, that he considered himself interested in the property given to his sister by his father's will: and he made a general gift of his own property to his wife, under whom the plaintiffs claim to be entitled.

Mary Ann Russen married, and was now the defendant, Mary Ann Noble; but she had no child.

Mr. Tinney and *Mr. Elderton*, for the plaintiffs.

Mr. Pemberton and *Mr. Turner*, contra.

THE MASTER OF THE ROLLS. [LORD LANGDALE.] The first question is, what estate is given to Mrs. Noble? Is she entitled to an estate for life only, or to an absolute estate, subject to be defeated by a contingent executory gift over? If the former, the plaintiffs are entitled to the claim, which they have made in this respect. If the latter, it is to be considered, whether the event on which the executory gift over was to take effect, can now happen.

It is admitted on both sides, that Mrs. Noble has an equitable estate for life. During her life it is the office of the trustees, to preserve for her, the separate and independent use of the income; after her decease, it is the office of the trustees, to convey and assign all the testator's interest to her heirs, executors, administrators, or assigns. It is not the case of an equitable or trust estate for life, with a use executed in the heir, upon the death of the tenant for life; but a case, in which the trustees have a duty to perform, after, as well as before,

the death of the tenant for life; and in which the duty after the death of the tenant for life, is clear and defined, neither requiring nor admitting of any modification. There would, on the death of the tenant for life, be nothing for this court to do, but to direct the conveyance or assignment to the heirs, executors, administrators or assigns; and I think that upon the construction of this part of the will, independently of the contingent executory gift over, there is an equitable estate for life, with an equitable remainder to the heirs, executors, administrators, and assigns; and that Mrs. Noble has an absolute estate, subject to be defeated by the executory gift over.

And if this be so, the question is, whether the particular event on which the vested estate was to be devested, can now happen; and having regard to the intention of the testator, and the words in which the gift over is expressed, I am of opinion, that the gift over was to take effect, only in the event of Mrs. Noble's marrying and dying without issue, in the lifetime of her brother, or of such child or children as he might happen to leave; and as he died in her lifetime, and had no child, I think that the contingent executory gift cannot take effect, and that the estate already vested in Mrs. Noble cannot now be devested.

DOE d. BLOMFIELD *v.* EYRE.

EXCHEQUER CHAMBER. 1848.

[*Reported* 5 *C. B.* 713.]

PARKE, B.,[1] now delivered the judgment of the court.[2]

This case comes before us on a writ of error on a judgment of the Court of Common Pleas on a special verdict. The facts of the case are fully stated in the special verdict. It is unnecessary to advert to them in detail; a very short statement is sufficient to explain the questions which we have to decide.

On the marriage settlement of Mary Sida, a copyhold estate of which she was seised in fee, was settled to the use of her husband for life, and, after his death, to the use of Mary Sida, for life, and, from and after her decease, to the use of such child or children of the body of Mary Sida, by her intended husband, and for such estates or other interest, and in such parts, shares, or proportions, as Mary Sida, by any deed or writing, sealed in the presence of, and attested by, two witnesses, or her last will, duly executed, might direct and appoint; and, for want of such appointment, to the use of all the children of the marriage, as tenants in common in tail; and, in default, to Mary Sida in fee.

[1] Only the opinion is here given.

[2] PARKE, B., ALDERSON, B., COLERIDGE, J., PLATT, B., ERLE, J., ROLFE, B., and WIGHTMAN, J.

Mary Sida, in the lifetime of her husband, and then having two sons, made a will, duly executed according to the power, and appointed the estate to her eldest son, John Blomfield, and his heirs and assigns forever, upon condition that he should pay to her other son £200, within a year and a day after her husband's death, in case he should be living, and twenty-one years of age, &c.; but, if neither of her sons should be living at the decease of her husband, she appointed the estate to her father-in-law, his heirs and assigns, upon certain trusts.

The testatrix died in 1782. John Blomfield, the devisee, died in 1820, in his father's lifetime, leaving the lessor of the plaintiff, his youngest son and customary heir: and the father died afterwards, in 1820. William Blomfield, the second son, had previously died, in 1767.

This action was brought in 1841. The defendant defended for six seventh parts of the property; and the question is, whether the lessor of the plaintiff is entitled to recover those six sevenths.

The Court of Common Pleas decided that he was not; and we are of opinion that their decision was correct.

Two objections were made to the title of the lessor of the plaintiff. The first objection was, that there was no dispensation of coverture in the power given to Mary Sida; and that her execution of the power during coverture, was therefore void. The second was, that John Blomfield, the son, had no estate which descended to the lessor of the plaintiff.

We intimated our opinion, in the course of the argument, that it was clear that there was in this case, an implied dispensation of coverture, and that there could be no doubt that the meaning of the settlement was, that the power should be executed by Mary Sida whether she were sole or covert.

The second was the principal question. It was contended, on behalf of the defendant in error, that the appointment to the son was altogether void, by being so connected with the appointment to the father-in-law that it could not be separated. If this was so, the plaintiff could not be entitled to recover. But the learned counsel for the plaintiff in error, argued, that the appointment was not altogether void, but gave a vested defeasible estate in fee to the eldest son; and that the appointment over alone was void.

Admitting that argument to be correct, — as we think it was, — we are of opinion, that, in the event which has happened, this estate was put an end to, and, consequently, that the lessor of the plaintiff is not entitled.

The learned counsel contended, that, where there is an estate in fee, liable to be defeated on a condition subsequent, and that condition either originally was, or by matter subsequent became, impossible to be performed, the defeasible estate was made absolute; and he cited Co. Lit. 206 a. Of this there is no doubt; the principle is applicable to this case, if the condition was impossible. But the question is, what was the condition by which the testatrix meant the estate to be

defeated. Was it — if the two sons should die in the father's lifetime? or was it — if they so died, *and* the estate should, by law, vest in the father-in-law? In the former case, the plaintiff would fail; in the latter, he would succeed.

This question is not peculiar to cases of appointments under powers: it might arise upon an ordinary will. If a testator were to devise to A. B. in fee, and to direct, that, in the event of A. B. dying in the lifetime of J. S., the estate should go over to a charity, it surely is perfectly clear, that, if A. B. died in the lifetime of J. S., he, A. B., or, rather, his heirs, would lose the estate. The testator could not give to the charity, without taking away from the devisee. The testator, therefore, in such a case, by his will says: "If A. B. dies in the lifetime of J. S., I do not mean that A. B. or his heirs should any longer have the estate." The estate of A. B. is in such case defeated, not by the giving over of the estate to the charity, but by the happening of the event on which the testator intended it should go over.[1] So, in the case

[1] In the case of a devise by A. to B. in fee, upon a contingent event, without more, the land descends to the heir of A., subject to the contingent executory devise, and the fee is in the heir of A., until that devise takes effect. Any declaration that, until the event contemplated, A.'s heirs shall not have the land, would be nugatory, as the heir necessarily takes in the absence of an immediate effectual disposition thereof. So, in the case of a devise by A. to B. in fee on a contingent event, and subject to the contingent devise, to C. in fee, C. is substituted for the heir of A., and the fee vested in C. remains undivested until the devise to B. takes effect. In *each case* the intention is, in the event contemplated, not simply that the primary taker shall *not retain* the land, but that the land shall *go* preferably to B., and if, from any cause whatever, B. is incapable of taking, the divesting intention fails. (Acc. *per* Rolfe, B., 5 C. B. 744.) The effect is, in substance, the same where A. devises to B. in fee, with a contingent executory devise over to C. If, by any means, the devise to C. is removed out of the way, or if the devise to C. is of a less estate than the fee, the estate of B. is not defeated, or is only partially defeated. The estate was not intended to be taken from B., *for any other purpose than that of giving it to C.*, and that purpose failing, A.'s original bounty remains in full operation. It appears to be immaterial from what cause the executory devise to C. fails of effect, whether by reason of the contingency itself not arising, or of its being too remote, or of the death of C. in the lifetime of A., or of C.'s incapacity to take. The late case of *Jackson* v. *Noble*, 2 Keen, 590, appears to be in substance this: A. devises to B. in fee, but in case B. shall leave no child, then to C. or his children surviving B. C. dies in the lifetime of B. without leaving any child. It was held, that the estate already vested in B. could not be divested, although B. (who was living) should die without issue, — that B. had "an *absolute* estate, subject to be *defeated* by the contingent executory gift over," of which gift the object had failed. It was not attempted to be argued that the contingency on which the estate was limited over, could be incorporated, as a qualifying ingredient, in the primary gift to B. The principle seems to be, — that the intention in favor of the primary devisee is qualified *for the benefit of another object of bounty*, and is for that reason only, not absolute, and that whenever, and by whatever means, that object is removed, the inducement to disturb the primary gift has ceased. The same principle appears to apply equally to a conveyance *inter vivos*, and to a posthumous conveyance by devise, although, in the latter case, the manifestation of the intention of the disposing party, may be less fettered by technical rules of construction.

Before the 1 Vict. *c.* 26, § 25, if A. had devised Blackacre to B. in fee, on a contingency, which happened, — so that the intention in favor of B. took effect absolutely,

before us: the testatrix (for, for this purpose, she may be treated as an ordinary testatrix), says, in substance: "If my son John and his brother William die in their father's lifetime, I do not mean him (John) to have the property; but I give it over to strangers." That which defeats the estate of John, is the death of himself and brother in his father's lifetime, — not the giving over of the estate to strangers. The reason why John's representatives cannot claim the property, is, that his mother expressly declared, that, in the event which happened, he should not have it. How she would have disposed of it, if she had known that she could not give it in the mode proposed by her will, can only be matter of conjecture. One thing quite certain, is that she has not expressed any intention, that in the events which have happened, John should take: and, as he could only be entitled by virtue of an

— the devise, by the death of B. in A.'s lifetime, lapsed, for the benefit of the heir of A., notwithstanding the existence of an operative residuary devise to C.; for, every devise of land being at that time really specific, the devise of the residue was nothing more than a devise of the lands of which A. was then seised, other than Blackacre, which A. supposed himself to have already disposed of in all events. But, *now* Blackacre would pass under the residuary devise; such a devise embracing all the realty from any cause whatever not effectually disposed of; and thereby constituting a universal *hæres factus*. So, under the old law, A. might have expressly devised Blackacre to B. in every event in which it was not effectually devised to C. and might have thereby constituted B. a special *hæres factus;* and the question is, whether A., by devising to B., with a contingent executory devise to C., would not have sufficiently declared that intention. (And see Sweet, Convey., 2d ed. 424–427.)

Where there is a devise by A. to B. in fee, defeasible on an event which happens, in favor of C. in fee, and C. dies in the lifetime of A., the only mode, it is conceived, by which the heir of A. could be let in, would be, to treat the devise to B. as revoked by the devise to C. becoming absolute, and to consider the heir of A. as *in* by the lapse of the devise to C., instead of treating the devise to B. as ceasing to be defeasible on the failure of the devise to C. But A., it is submitted, declares, not that if the contingency happens, B. shall *lose* the estate, but, simply, that if the contingency happens, C. shall *have* the estate. — REP.

"The case has been before the Exchequer Chamber, and the judgment has been affirmed (5 Com. Bench, 713), upon clear and satisfactory grounds. The judges held that the eldest son took a vested defeasible estate in fee, and that the appointment over alone was void. This estate in the son in the event which had happened was put an end to, for the condition by which the estate was to be defeated was, if the two sons should die in their father's lifetime, and not if they so died *and* the estate should by law vest in the father-in-law. It would be so upon an ordinary devise to one in fee, and if he died in the lifetime of A. over to a charity, when if the event happen the devise ceases, although the charity cannot take.

"The reporters have added a note to the above-mentioned case, with a view to impeach the decision upon the ground that as the gift over to the father-in-law could not take effect, the gift to the son was not defeated. After showing that where there is a devise in fee upon a contingency, the land in the mean time descends to the testator's heir-at-law, the note proceeds to say that in the case of a devise by A. to B. in fee on a contingent event, and subject to the contingent devise to C. in fee, C. is substituted for the heir of A., and the fee vested in C. remains undevested until the devise to B. takes effect. In each case the intention is, in the event contemplated, not simply that the primary taker shall not *retain* the land, but that the land shall *go* preferably to B., and if from any cause whatever B. is incapable of taking, the devesting intention fails, and an observation which fell from Mr. Baron Rolfe during the argument is re-

expressed intention in his favor, we think that he fails to establish any right.

Judgment affirmed.

John Hodgson (with whom was *Willes*), for the plaintiff in error.
Bovill (with whom was *Tulfourd*, Serjt.), for the defendant in error.

ROBINSON *v.* WOOD.

CHANCERY. 1858.

[*Reported* 27 *L. J. Ch.* 726.]

JOHN DALES ALLISON, by his will, dated the 3d of September, 1840, devised all his freehold, customary and copyhold estates, whatsoever

ferred to in support of this position. Now in the first place there can be no vested devise over after a contingent devise in fee; but, to come to the main point, the opinion of Rolfe, Baron, does not support the position for which it is quoted. If it did, yet as he concurred in the judgment, any *obiter dictum* of his before judgment was pronounced, adverse to the view of the court, could not be relied upon. In the course of the argument, Parke, B., asked for a reference to any case of a limitation to one and a conditional limitation over to a person who could not take, as a corporation, &c., to which it was answered from the bar that no doubt there were some such cases — of that class were the cases of perpetuity; whereupon, Rolfe, B., said, that can hardly apply: the first taker is clearly intended to take, and takes forever unless the estate can go over to another. His observation therefore is confined to a case where the fee is first given and then there is a gift over void for perpetuity, in which case the fee remains in the first devisee, and the gift over is simply void. But this has no bearing upon the principal question, for here the testatrix could by law declare her intention, that upon the happening of the contingency, the devise to her son should cease, whereas in the case put at the bar and answered by the learned baron, the testator could not by law defeat the first devise in the event which he provided for: the law forbade the devise over, and therefore the first devise remained unaffected by it. The reporters state that in these and similar cases it appears to be immaterial from what cause the executory devise over fails of effect, whether by reason of the contingency itself not arising, or of its being too remote, or of the death of the executory devisee in the lifetime of the testator, or of the incapacity of the executory devisee to take; and in support of this view the case of *Jackson* v. *Noble*, 2 Kee. 590, is relied upon. Mr. Jarman (1 Wills, 2 ed. 783) had previously referred to the same case as an authority, that where a devise in fee is followed by an executory limitation in fee in favor of an object or class of objects not *in esse*, and who in event never came into existence, the first devise remains absolute. And so he adds, if the executory devise were void on account of its remoteness or from any other cause, the prior devise would be absolute. This we have seen was ruled otherwise by the Exchequer Chamber. The case of *Jackson* v. *Noble* was decided not on any general rule, but on the ground that looking at all the devises the estate was not intended to go over in the event which happened. It would be out of place to enter here into an examination of the case of *Jackson* v. *Noble;* but if it cannot be supported upon the intention as collected by the court, it must be considered as opposed to the later decision in the Exchequer Chamber, which affirmed the judgment of the Common Pleas. The point upon the devise over appears to have been there decided on solid legal grounds. The point ruled is that an absolute appointment to an object of the power with an executory gift over in a given event to a stranger will cease upon the happening of the event although the appointee over is incapable of taking the estate." — *Sugd. Pow.* (8th ed.) 513, 514.

and wheresoever, whereof or wherein he or any person in trust for him was seised or possessed, or to which he was entitled for any estate of inheritance, or over which he had or might have any power of appointment or disposition, or in which he had any devisable interest, whether in possession, reversion, remainder or expectancy, to hold the same to them, their heirs and assigns, upon trust, as soon as conveniently might be after his decease, to sell such part of his real estate as his trustees should think fit or needful, and pay such of his debts as his personalty was insufficient to discharge, and subject thereto to receive the rents of the remaining part of the real estate, and pay and apply the same for the maintenance, education and bringing up of his daughter, Ann Dales Allison, otherwise Ann Dales, born to him by his wife, Harriet Allison, until she attained the age of twenty-one years; and when his said daughter should attain the age of twenty-one years, upon further trust to convey, assign, transfer and assure the said residuary freehold and other real estate and property, subject as aforesaid, unto and to the use of his said daughter, her heirs and assigns forever. And in case his said daughter should happen to depart this life under the age of twenty-one years, leaving lawful issue her surviving, then he directed that his said trustees or trustee for the time being should stand possessed of the said residuary real estate, upon trust for the absolute use and benefit of such issue, his, her or their heirs and assigns, as tenants in common; but in case his said daughter should happen to depart this life under the age of twenty-one years without leaving lawful issue her surviving, then upon trust to receive the rents, income and profits of his said estates and property, and equally divide the same between his said wife, if she should be then his widow and unmarried, and Mary Allison, share and share alike, with benefit of survivorship between them during their joint lives, and after the decease of the survivor upon trust to sell the said residuary freehold and other real estate and property, and pay the money to arise from such sale to the treasurer of the Primitive Methodist Society.

The testator died in September, 1840, leaving Ann Dales Allison, his only child, him surviving. The testator's widow and Mary Allison both died in the lifetime of the daughter, Ann Dales Allison, who died in March, 1856, under twenty-one years of age, without having been married.

The plaintiff, who was the heir-at-law of Ann Dales Allison, filed the bill in this cause claiming to be entitled to the estates devised by the testator, alleging that the devise to the testator's daughter was a vested estate in fee simple, and that as the charitable gift to the Primitive Methodist Society was void under the Statute of Mortmain, he was entitled as her heir-at-law.

The defendants were the trustees of the testator's will, who claimed the real estates as undisposed of.

Mr. Baily and *Mr. Hobhouse*, for the plaintiff.

Mr. Swanston and *Mr. Kay*, for the defendants.

KINDERSLEY, V. C. This is a case of considerable importance. There are two questions of construction raised and they are questions of common law without any ingredient of equity except that there is a devise to trustees, and therefore the interests are equitable, and whatever construction a court of law would put upon this instrument, a court of equity would put the same. The question then is, first, whether there is by the prior part of these limitations an absolute vested estate in fee simple given to the testator's daughter. It is not necessary for the determination of this case to decide that question; but my impression is, that it is a vested estate in fee simple in the daughter, Ann Dales Allison, liable of course to be divested. It is sufficient however to say, that I will assume in favor of the plaintiff that the testator's daughter took such absolute vested estate in fee simple in the first instance, although she did not live to attain the age of twenty-one years. Then the next question is, whether the estate was divested by virtue of the subsequent clauses. Those clauses provide for the divesting of the estate in certain events: first, in the event of her dying under twenty-one, leaving issue; and the other, of her dying under twenty-one without leaving issue, which is the event that has happened. Now, of course, as this was a devise to a charity, it was void under the Statute of Mortmain, 9 Geo. 2, *c.* 36, §§ 1 and 2. The Statute directs, that no lands shall be given in trust, or for the benefit of any charitable uses whatever, except in a particular manner. And then follows the third clause, directing that all gifts of any lands, tenements or hereditaments to or in trust for any charitable uses whatever, which shall be made otherwise than in that particular manner, shall be absolutely and to all intents and purposes null and void. It has been argued, that the entire gift over being void, there is nothing to divest the estate from the original taker, and I confess that I have much difficulty in getting over that reasoning; but I find that the precise question has been brought before the Court of Common Pleas and the Court of Exchequer, and it has been held that, where there is a gift over purporting to divest a prior estate in fee simple, if the devise over fails for any reason, the intention of the testator must be taken to have been that the devise should nevertheless operate to carry the estate over. Now, whatever opinions I may entertain upon the point, it is not for me, in the exercise of my functions, to overturn that decision. It appears to me, that not only is every particular the same in the case of *Doe* v. *Eyre*, 5 Com. B. Rep. 713, but the arguments there used are entirely adverse to the claim of the plaintiff, and I must presume that the observations used are to be taken as the expression of opinion of the whole Court of Exchequer Chamber. If that were the case, it must follow as a matter of course, that if the case now before the court were decided by the same judges, their decision would be adverse to the case of the plaintiff. How, therefore, can I take upon myself to say that the decision was wrong? If there had been a series of decisions the other way, one would have to be weighed

against the other; but what are the cases cited, and suggested as being adverse? First, there is the case of a gift by will of property, or a share of property, to a child, importing an absolute gift, and directing subsequently that the share should be settled; that does not bear upon the present case, because that was not a case which turned on divesting upon a contingency. There was no contingency at all; the testator stated that he meant to give an absolute interest, which however he wished to be modified, in order that the children might have it: but if there were no children, the original gift was to prevail. Those are not cases raising the same question. The only other case is that of *Jackson* v. *Noble*, which it is extremely difficult to reconcile with *Doe* v. *Eyre*, by reason of the language there used; but when it is looked into, it will be found that the ground of the decision was, that the contingency there contemplated, on which the gift over was to take effect, had never happened. Of course, if that was the ground upon which the decision was founded, it does not touch the present question; and whether that decision was right or wrong is of no moment, because, at all events, it is not a decision adverse, and therefore upon the state of the pronounced opinions, it is impossible to say that the gift over is entirely inoperative; and whatever my opinion might have been but for the case of *Doe* v. *Eyre*, and I confess it is extremely doubtful whether I should have been of the opinion there expressed, I feel myself under the necessity of coming to the same conclusion. If I had not been precluded by law, I should probably have submitted this question to the very court who decided *Doe* v. *Eyre*, for their opinion; and if I had done so, I cannot doubt but that they would have decided in conformity with their previous decision. I must therefore dismiss this bill; but having regard to the nature of the case, I shall dismiss it without costs.[1]

O'MAHONEY *v.* BURDETT.

HOUSE OF LORDS. 1874.

[*Reported L. R. 7 H. L.* 388.]

THIS was an appeal against a decision of the *Lord Chancellor Brady* and the *Lord Justice of Appeal Blackburn* in Ireland, reversing a previous decision of the Master of the Rolls there, 10 Ir. Ch. Rep. N. S. 14. Jane Brooke in September, 1840, made her will, which contained the following clause: "I bequeath to my sister Grace L'Estrange, the widow of Colonel L'Estrange, of Moystown, the sum of £1,000 in the 3½ per cent Irish Stock, for her life, and after her death to her daughter, Grace L'Estrange. If my said niece should die unmarried or without children, the £1,000 I here will to revert to my nephew, Colonel Henry

[1] See *Hurst* v. *Hurst*, 21 Ch. Div. 278, 284-286, 290, 293, 294 (1882).

L'Estrange, of Moystown." The testatrix then appointed John Burdett her executor and residuary legatee. The present respondent is his widow and universal legatee.

Grace L'Estrange, the sister of the testatrix, and also Colonel Henry L'Estrange died in the lifetime of the testatrix. The testatrix herself died on the 29th of March, 1848.

Grace L'Estrange, the niece, in 1851 married Edward William O'Mahoney, the appellant; and the bequest of the £1,000 was, upon occasion of her marriage, brought into settlement to her for her life, for her sole and separate use after her decease, to her husband for his life, then to the issue of the marriage, and in default of issue to the survivor, husband or wife. Mrs. O'Mahoney died on the 14th of December, 1871, without there having been any child of the marriage, and her husband, the appellant, survived her.

In 1858 a cause petition was presented to the Court of Chancery in Ireland by Mr. O'Mahoney and his wife, praying, amongst other things, that their right to the said legacy should be established; and an order to that effect was afterwards made by the then Master of the Rolls. On appeal Lord Chancellor Brady and Lord Justice of Appeal Blackburn concurred in reversing this order. Mr. Burdett, the executor and residuary legatee, died in 1870, leaving the present respondent his widow and personal representative. On the death of Mrs. O'Mahoney, in December, 1871, the appellant revived the suit, by suggestion, as against Mrs. Burdett. The question raised was upon the construction of the above bequest; whether, in the events which had happened, the sum of £1,000 had, on the death of the tenant for life, become the absolute property of Grace O'Mahoney and her assigns, or was affected by her own subsequent death without children, so as to go over by force of the ultimate gift to Burdett under Jane Brooke's will. The decision of the Court of Appeal, pronounced in 1859, was, by special order of the court, signed and enrolled on the 4th of January, 1873; and this appeal was then brought.

Mr. Serjeant Sherlock (of the Irish bar) and *Mr. F. Everitt*, for the appellant.

Mr. George May, Q.C. (of the Irish bar), and *Mr. Vaughan Hawkins* (*Mr. R. J. Robertson*, of the Irish bar, was with them), for the respondent.

Lord Selborne. My Lords, I am of the same opinion with my noble and learned friends.

The Master of the Rolls, in *Edwards* v. *Edwards*, 15 Beav. 357; 21 L. J. Ch. 324, had before him a case in which a distribution by assignment or transfer was expressly directed to be made after the death of the tenant for life; thereby *prima facie* terminating a trust which down to that time was to continue. His Lordship, in classifying, and deducing rules from, the previous authorities to which he referred, did not advert expressly to the distinction between such a case and one like that now before us, in which a mere succession of interests is pro-

vided for, without any such express words of payment, assignment, or distribution, indicating the termination of a trust. But the terms in which he states the rule derived by him from the two cases of the fourth class to which he refers — *Da Costa* v. *Keir*, 3 Russ. 360, and *Galland* v. *Leonard*, 1 Sw. 161 — are these, that "words indicating death, without leaving a child, as the event on the occurrence of which the gift over is to take effect, must be construed to refer to the occurring of that event before the period of distribution." In one of the two cases from which he so deduced this supposed rule, *Galland* v. *Leonard*, there was an actual distribution and winding-up of the trust expressly directed by the testator. In the other, *Da Costa* v. *Keir*, there was evidence of an intention that the legatee should in some event take an absolute interest; which intention must have been wholly defeated if the divesting clauses could not be referred to a period earlier than the death of the legatee. And the general result of his Lordship's examination of the authorities is thus stated at the end of that judgment, 15 Beav. 366: "If I am right in the view which I take of the principle of these cases, the effect is, as it appears to me, that the rule of the court is that the contingency, or the event which the testator speaks of as a contingency, is always referable to the period of payment or distribution, except in the single case where there is a simple gift to A., and, if he shall die without leaving issue, to B., in which case it cannot be referred to any period of distribution."

It is manifest that when a testator (as in *Galland* v. *Leonard*) has directed payment or distribution to be made at a certain time, so that a trust, intended by him to continue until that time, shall then come to an end, and has proceeded to substitute other devisees or legatees through the medium of the same trustees and the same trust, in case of the death, without leaving issue, of any of the persons to whom such payment or distribution was first directed to be made; there is strong *prima facie* reason for holding that the contingency must be intended to happen, if at all, before the period of distribution. And a rule so limited (subject, of course, to exceptions resulting from any particular words indicative of a contrary intention) would seem to be in harmony with sound principle and with the general current of authority.

A like conclusion may also *prima facie* be arrived at when the language of a will shows (as in *Da Costa* v. *Keir*) that the legatee was intended, in some event, to take an absolute interest, and when that intention cannot in any event receive effect unless the operation of such a divesting clause is limited to a time earlier than the legatee's death. Almost, if not absolutely, all the cases in which the fourth rule laid down in *Edwards* v. *Edwards* is found to have been applied, or referred to with approval, before the decisions now under appeal, will be seen, upon examination, to come within one or the other of these two categories.

I cannot, therefore, think that either the authorities prior to *Edwards* v. *Edwards*, or that case itself, or any by which it has been followed,

are sufficient to establish a general rule for the construction of all wills, when neither the reasons applicable to the two classes of cases which I have mentioned, nor any other reasons founded on the language of the particular will, may justify its application. It seems to me that it would be arbitrary, and in fact a *petitio principii*, to apply the phrase "period of distribution" (itself an equivocal term, which may mean either an apportionment of interests by the will, or a direction to trustees to divide and hand over a fund) to a case in which there is merely a particular estate (such as a life interest) followed by a limitation over to A. B., his heirs or executors, liable to be divested if, for example, A. B. dies without leaving issue living at the time of his death. The testatrix has not said that the fund is to be distributed, nor that the trust is to come to an end, upon the termination of the particular estate; nor can I perceive on what ground that which she has not said ought to be implied. The words of contingency are clear and sensible as they stand, and nothing needs to be added or implied for the purpose of giving them full effect. The reasons assigned by Lord Romilly for his second rule in *Edwards* v. *Edwards* seem to me to be not less applicable to such a case than to the particular class of cases which that second rule supposes; and I think it is the true result of the authorities, before *Edwards* v. *Edwards*, that in such a case, words limiting, by an unnecessary implication, the duration of the contingency on which the divesting clause depends, ought not to be added to the will.

This disposes of the appeal now before us, unless it can be held that the gift to Grace L'Estrange, the niece, being absolute in form, never became subject to the divesting clause, because the contingent gift by the clause was to a person who died in the testatrix's lifetime. When the appeal was first opened, I doubted whether, under these circumstances, the effect of the divesting clause was not wholly evacuated, in the same way as if there had been a blank in the will for the name of the substituted legatee. But the result of the preliminary argument on that point, and of the authority cited by the respondent, has been to satisfy me that the lapse of a contingent gift, by way of substitution, to a person named who might have survived the testatrix, operates (when the contingency has happened on which the gift to the person was made to depend) for the benefit of the residuary legatee, or next of kin, in the same way as if the gift had been originally made to the same person, free from any contingency.

Order appealed from affirmed; and appeal dismissed, with costs.[1]

[1] The opinions of Lord Cairns, C., and Lord Hatherley are omitted. They agree with that of Lord Selborne, and deal mainly with the Fourth Rule in *Edwards* v. *Edwards*. As to the effect of the executory devisee dying before the testator, Lord Hatherley said nothing; the Lord Chancellor said only as follows: —

"I ought to observe, lest it should appear to have been overlooked, that at one period of the argument, doubts were expressed whether, under the present will, the nephew, Colonel L'Estrange, having died in the life of the testatrix, the gift over from

SECTION III.

FAILURE OF PRECEDING INTEREST.

NOTE. — On the subject of this section see 2 Jarm. Wills, *c.* 50 ; Theob. Wills (3d ed.) 446–449.

JONES *v.* WESTCOMB.

CHANCERY. 1711.

[*Reported* 1 *Eq. Cas. Ab.* 245, *pl.* 10.]

A., possessed of a long term for years, by will devised it to his wife for life, and after her death to the child she was then *enseint* with ; and if such child died before it came to twenty-one, then he devised one third part of the same term to his wife, her executors and administrators, and the other two thirds to other persons, and made his wife executrix of his will, and died ; and the bill was brought against her by the next of kin to the testator, to have an account and distribution

Grace L'Estrange could take effect. This point was not raised in the court below, and I am satisfied that, the gift to Colonel L'Estrange having failed by lapse, the residuary legatee is entitled to take all that Colonel L'Estrange, if living at the death of the testatrix, could have taken" (p. 399).

"The same principles which determine the effect upon a posterior or executory gift of the failure of a prior gift, apply also to the converse case ; namely, that of the failure of an ulterior or executory gift, and the consequence of such failure on the prior gift. According to these principles, if lands are devised to A. and his heirs, and in case he shall die without issue living at his decease, then to B. and his heirs, and B. dies in the testator's lifetime, and afterwards A. dies accordingly without issue, having survived the testator ; the event having happened upon which the ulterior devise would have taken effect, and that devise having failed by lapse in the testator's lifetime, the title of the heir is let in ; or (if the will be regulated by the new law) then the title of the residuary devisee, the effect being precisely the same, in the events which have happened, as if the ulterior devise had been a simple, absolute devise in fee. On the other hand, if the devise were to A. and his heirs, and if he should die without leaving issue at his decease, then to B. for life, with remainder to his children in fee, and A., having survived the testator, dies without leaving issue, and B. also dies without having had a child (whether such event happens in the testator's lifetime or after his decease), the devise to A. becomes absolute and indefeasible, by the removal out of the way of the executory devise engrafted thereon ; such devise having failed (not by lapse, as in the former case, but) by the failure of the event on which it was made dependent. If B. had had a child, and such child had died in the testator's lifetime, the case would, it should seem, according to the principle of the case of *Tarbuck* v. *Tarbuck*, 4 L. J. N. S. Ch. 129, have become assimilated to the case first stated.

"The difference then, in short, is between a failure of the posterior gift by lapse, letting in the title of the heir or residuary devisee (as the case may be), and a failure in event, of which the prior devisee has the benefit." — 2 *Jarm. Wills* (*4th ed.*), 835, 836.

Drummond v. *Drummond*, 11 C. E. Green, 234 (1875), is *contra*.

of the surplus of his personal estate not devised by the will; and two questions were made: 1st, whether the devise to the wife of one third part of the term was good, because it happened she was not then *enseint* at all; and so the contingency, upon which the devise to her was to take place, never happened; the other question was, whether this term, being part of the personal estate, and expressly devised to her for life, with such other contingent interest on the death of the supposed *enseint* child before twenty-one, should shut her out from the surplus of the personal estate, which belonged to her as executrix, and so the surplus go in a course of administration, to be distributed amongst the plaintiffs, as next of kin. As to the first point, Lord Keeper [LORD HARCOURT] delivered his opinion, that though the wife was not *enseint* at the time of the will, yet the devise to her of such third part of the term was good; and as to the other point dismissed the plaintiff's bill, and so let in the executrix to the surplus of the personal estate, notwithstanding the devise to her of part, as aforesaid.[1]

[1] See *Murray* v. *Jones*, 2 V. & B. 313 (1813); *Mackinnon* v. *Sewell*, 2 M. & K. 202 (1833).

"*Frogmorton* v. *Holyday*, [3 Burr. 1618], was a case similar in character to that of *Jones* v. *Westcomb*, and what Lord Mansfield says is this: 'A question applicable to this part of the argument was pleaded in the days of ancient Rome by Scævola and Crassus, in the famous cause between Curius and Coponius, and was much agitated in modern times in the courts of Westminster Hall, in the case of *Jones* v. *Westcomb*. A man, taking for granted that his wife was with child, devised his estate to the child his wife was *enceinte* of, and if such child died under age then he devised it over. The woman was not with child. The question was, 'whether the devisee over should take;' Lord Mansfield (with a little sarcasm perhaps) says, 'the Roman tribunals at once and the English at last, finally determined that the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it; consequently, no posthumous child having ever existed, the substitute was entitled.'

"The reporter, in the margin, mentions the cause which Lord Mansfield referred to as occurring in Rome, and which seems to have made such an impression upon Cicero that he has twice referred to it, — once in his treatise *De Oratore*, lib. 1, c. 39, and once in the *Oratio pro Cæcina*. The passage in the *Oratio pro Cæcina* expresses so clearly the sound sense of the judges before whom the question was brought that I think it is worth reading: 'Non occurrit unicuique vestrum aliud alii in omni genere exemplum, quod testimonio sit, non ex verbis aptum pendere jus, sed verba servire hominum consiliis et auctoritatibus? Ornate et copiose L. Crassus, homo longe eloquentissimus, paulo ante quam nos in forum venimus, judicio centumvirali hanc sententiam defendit; et facile, cum contra eum prudentissimus homo, Q. Mucius, diceret, probavit omnibus, M'. Curium, qui hæres institutus esset ita, "mortuo postumo filio," cum filius non modo non mortuus, sed ne natus quidem esset, hæredem esse oportere. Quid? verbis satis hoc cautum erat? Minime. Quæ res igitur valuit? voluntas; quæ si tacitis nobis intelligi posset, verbis omnino non uteremur: quia non potest, verba reperta sunt, non quæ impedirent, sed quæ indicarent, voluntatem' (Pro Cæcina, c. 18). That is to say, though it never was, perhaps, better expressed than in that passage, the clear and manifest intent is to prevail." — *Per* WOOD, V. C., in *Warren* v. *Rudall*, 4 K. & J. 603, 609–611 (1858).

WILLING *v.* BAINE.

CHANCERY. 1731.

[*Reported* 3 *P. Wms.* 113.]

A. BY his will devised £200 apiece to his children, payable at their respective ages of twenty-one; and if any of them died before their age of twenty-one, then the legacy given to the person so dying, to go to the surviving children. He devised the residue of his personal estate to A. B. and C. (being three of his children), and having made them executors, died.

One of the children died in the testator's lifetime, and after the testator's death one of the executors and residuary legatees died. Upon this two questions arose, first, whether the legacy of the child that died in the life of the testator should go to the surviving children, or should be a lapsed legacy, and sink into the surplus? 2dly, whether when one of the executors and residuary legatees died, his share of the *residuum* belonged to his executor, or to the surviving residuary legatees?[1]

As to the first, it was objected to be the constant rule, that if the legatee dies in the life of the testator, this legacy lapses, which took in the present case: for here the child, the legatee, died in the lifetime of the testator: that it was true, there was a devise over of the legacy, in case any of the children should die before their age of twenty-one; but such clause could not take place in the present case, because there can be no legacy, unless the legatee survives the testator, the will not speaking till then; wherefore this must only be intended, where the legatee survives the testator, so that the legacy vests in him, and then he dies before his age of twenty-one.

On the other side it was said and resolved by the court [LORD KING, C.] that the rule is true, that where the legatee dies in the life of the testator, his legacy lapses (*i. e.*), it lapses as to the legatee so dying; but that in this case the legacy was well given over to the surviving children; for which 2 Vern. 207, *Miller* v. *Warren*, was cited, where there was a devise of a legacy of £1,500 to A. payable at his age of twenty-one, and if A. died before, then to B. On A.'s dying in the lifetime of the testator, though this was never a legacy with respect to A., but lapsed as to him, by his dying in the life of the testator, still it was held to be well devised over. So in the case in 2 Vern. 611, of *Ledsome* v. *Hickman*. In like manner, if *land* were devised to A. and if A. should die before twenty-one, then to B. on A.'s dying in the life of the testator, and before twenty-one, this would be a good devise over of the land to B.

[1] That part of the case which concerns this second point is omitted.

AVELYN *v.* WARD.

CHANCERY. 1750.

[*Reported* 1 *Ves. Sr.* 420.]

SERJEANT URLING devised his real estate to his brother, Goddard Urling, and his heirs, on this express condition, that within three months after his decease, he should execute and deliver to his trustee, a general release in full words, of all demands which he might claim on his estate or any part, for what cause soever. But if his brother should neglect to give such release, the said devise to him should be null and void to all intents, and in such case he devised it to Richard Ward and his heirs and assigns forever.[1]

He gave some bequests to his sister: and in the end of the will there was a clause, that what was given to Goddard Urling and his sister should be taken in full satisfaction of the claims and demands which they or either of them could make on any part of his real or personal estate; and upon this express condition, that the sister and her husband and the brother, within three months after his decease, executed a general release of all manner of actions, causes of action, debts, claims, challenges, and demands whatsoever, in law or in equity, against his trustee or his representatives, of, in, to, and out of his estate, real and personal.

Goddard Urling, the first devisee upon this condition, *who happened to be heir-at-law*, died in life of the testator.

LORD CHANCELLOR [HARDWICKE]. On this will the court is bound to make such a construction as to make good the plain intention of the testator, provided there are words in the will for it, or it can be done consistent with the rules of the court.

The question will very much turn on this: whether this devise over is to be considered, and the contingency on which it is given, as a strict condition or a conditional limitation; for if the former, it would be very difficult to maintain that the second devisee could have the estate but upon a strict breach or non-performance. If the condition had been performed, or it became impossible by act of God, that cannot be: but if it be a conditional limitation, the consideration is different; and I know no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate so as to leave a proper remainder, or to defeat an absolute fee before, by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place: and I am of opinion, this must be so construed. If it is a condition strictly, it is subsequent; because the estate would vest in Goddard Urling, and to be defeated by what might happen afterward. But that is not

[1] Part only of the case is here given.

the construction in this case, and never is; for if there is a devise to a stranger, not the heir-at-law, upon a condition subsequent, the devisee over cannot take advantage of the breach; for the benefit thereof is not devisable, but must go in privity to the heir-at-law of the grantor, who must enter for the breach, not the devisee: though in some cases perhaps a court of equity might make the heir a trustee for the devisee. Therefore where an estate is devised paying a sum of money; and if not paid, over to another: it is a conditional limitation to effectuate the devise, not a condition, according to Co. Lit. But this is stronger, because the devise is to the heir-at-law; who being the only person to take the advantage, and if he survives the testator, must be supposed to be in possession by the devise, must enter on himself: then how could this condition be made effectual according to law? It will be construed therefore a conditional limitation: and it ought to take effect, notwithstanding the words *that if he gave not such release it should be null*, &c. If it is to be construed as a strict condition, what is insisted on for the plaintiff, that there must be a strict breach or forfeiture in fact agreeable to the words to make the subsequent estate take effect, would be the rule. But as it is a conditional limitation, it comes to the question whether it is necessary every particular fact should take place; or whether it is not to be construed according to the sense and intention of the testator, that if in any event the first cannot take place, the subsequent should; if so, the substance of this was the intent of the testator, that if no such release was executed, whereby the demand against his estate would exist, the estate should go over. And I think the determination of Lord Harcourt, and of the Court of B. R. in the first case upon the term, that it was a good limitation though no child born, considering it the same as if the testator had said that if no issue should be of such child, is in point: but more strongly the determination of B. R. in the last case upon the freehold. The cases put of a remainder on a particular estate are admitted: but it is said they differ from a conditional limitation, to introduce an executory or springing devise after a fee. I do not find any authority to warrant that distinction; for *Jones* v. *Westcomb* is a strong authority, that the construction ought to be the same, whether it is on a remainder so limited on an estate which never takes effect, or whether it is a contingent limitation after a fee; for in that case it was so in respect of the freehold, notwithstanding the devise for life which was precedent to the limitation in fee to the child and his heirs, after which comes the limitation to the subsequent devisees. As that fee to the child stood before the limitation over to the persons claiming, the precedent estate for life did not alter the case; because there was a complete disposition of the fee before the devise over, if the child had been born. Therefore, with all deference to the contrary opinion of the court of C. B., *Jones* v. *Westcomb* is in point; concurring with the resolution in B. R., especially the last, which has there the advantage, against that single resolution in C. B., and agreeing with the opinion given

by me in *Fonnereau* v. *Fonnereau*, 3 Atk. 316. But this case is stronger, from the clause expressly excluding the sister, now heir-at-law, in all events from taking any other benefit than what was given by the will; which is an injunction upon her to release every other claim, action, &c., and this is to be recovered by action.[1]

DOO *v.* BRABANT.

King's Bench. 1792.

[*Reported* 4 *T. R.* 706.]

This case was sent here by the direction of the Lord Chancellor. And the question arose on the will of S. Counsell, who gave certain money in the funds to trustees in trust for S. Counsell, daughter and only child of her late husband deceased, then of the age of twelve years, until she should attain twenty-one, and when and so soon as she should attain that age, then upon trust to pay and transfer the same to S. Counsell, her executors, &c., to and for their own use and benefit; and in case S. Counsell should die under twenty-one, leaving any child or children of her body lawfully begotten, then in trust for all and every such child and children who should live to attain his or their age or ages of twenty-one, and to be equally divided between them. But in case S. Counsell, should die under twenty-one without leaving any child or children, or being such, they should all die under twenty-one, then in trust for her three nieces, Mary, Ruth, and Sarah Ogle. S. Counsell, the daughter, married B. Doo, attained the age of twenty-one, and had two children living at the time of her death, which happened in the lifetime of the testatrix. The two children of S. Counsell the younger were the plaintiffs in the suit, and Ruth (formerly Ruth Ogle, the survivor of the three nieces of the testatrix) and her husband were the defendants. Ruth Brabant is the next of kin of the testatrix. The question was, whether the plaintiffs took any and what estate under the will of S. Counsell.

Shepherd, for the plaintiffs.

Chambre, *contra*, was stopped by the court.

Lord Kenyon, C. J. Nothing can be more clear than the words of this will. The devise is to S. Counsell when she shall attain the age of twenty-one, and if she shall die under twenty-one leaving children, then to those children; but she did not die under that age, and therefore nothing can pass to the grandchildren. If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grandchildren; but as she has not done so, we cannot make a will for her. This is distinguishable from the cases cited; for

[1] See *Warren* v. *Rudall*, 4 K. & J. 603; s. c. *sub nom. Hall* v. *Warren*, 9 H. L. C. 420 (1861).

here nothing was given to the grandchildren but upon an event which did not happen.

Ashhurst, J., of the same opinion.

Buller, J. The testatrix intended to give the whole to S. Counsell, if she attained the age of twenty-one, and the children nothing; she did attain that age, and therefore nothing was intended to be given to the children in that event. There is a distinction in some of the cases, *Willing* v. *Baine*, 3 P. Wms. 113, and a case there referred to, between words giving a remainder over, and an original devise: in those cases the devise was good, not as a remainder over, but as an original devise; but here was no original devise to the grandchildren, but on an event which did not happen.

Grose, J. The event which has happened was not foreseen, and therefore not provided for.

Lord Kenyon then said, that the form of the case must be altered, as in *Sabbarton* v. *Sabbarton*, Cas. Temp. Talb. 245, before the court could certify to the Lord Chancellor; for that as it now stood, of a limitation of money, they could not take judicial notice of it.

The case having been since altered accordingly, in which it is stated as a limitation of a term of years, the following certificate was sent by this court: —

"We have heard counsel, and considered this case; and are of opinion that the plaintiffs took no estate whatever in the said leasehold premises by virtue of and under the said will of the said Sarah Counsell; the events upon which the limitation under which they claim was to take place not having happened.

"Kenyon, W. H. Ashhurst, F. Buller, N. Grose.

"9th June, 1792."

LOMAS *v.* WRIGHT.

Chancery. 1833.

[*Reported* 2 *Myl. & K.* 769.]

The testator, by the settlement made in favour of his natural children, limited certain estates to the use, intent, and purpose that, in case Mary Lomas should happen to have another child by him, Nathaniel Wright, then that such after-born child should out of the said premises have, receive, and take during his natural life an annual rent or sum of £25, and subject to such charge, and certain other charges therein mentioned, to the use of Henry Lomas, his heirs and assigns forever; but in case Henry Lomas should happen to die under age, and without issue, then, subject, as aforesaid, to the use of such after-born child as aforesaid, if a son, his heirs and assigns forever; but in case there

[1] See s. c. 3 B. C. C. 393.

should be no after-born son as aforesaid, or in case there should be one and he should die under age and without issue, then, subject and charged as aforesaid, to the use of Oller Lomas, his heirs and assigns forever. Henry Lomas and Oller Lomas both died under age, and without issue; Peter Lomas, the after-born son, attained his age of twenty-one; and the question was, whether the executory devise over was void, being dependent on the death of a devisee incapable of taking, or whether it was accelerated by reason of the incapacity of that devisee.[1]

Mr. Wray, for the Crown, which represented the interest of Oller Lomas.

Mr. Tinney and *Mr. Kindersley*, contra.

The Master of the Rolls. [Sir John Leach.] If in a grant or devise there be a limitation in fee which is wholly void, no estate passes, and the use remains in the grantor, or results to the heir of the testator. So, if the void limitation be not of the fee, but of a partial interest only as an estate for life, the use of such partial interest in like manner remains in the grantor, or results to the heir of the testator. The use in this case to the after-born child in fee, resulted to the grantor, and the subsequent gift to Oller Lomas being to take effect only in case the after-born child died before he attained twenty-one, and such after-born child having in fact attained twenty-one, the limitation to Oller Lomas could never take effect, and the Crown, standing in his place, can have no claim. The heir of the grantor is, therefore, entitled to the estate limited to the after-born son and his heirs.

There is a case in the books which, at first sight, seems to militate against the principle which I have stated. If there be a devise to a monk for life, with remainder over, it has been held that the devise to the monk is void, and the remainder over takes effect upon the death of the testator. The reason given for that decision is, that a monk is *civiliter mortuus*, and that the effect is the same as if the devise had been to a person who had died in the lifetime of the testator; that reason has no application here, and is, indeed, somewhat quaint. It appears, by reference to the Registrar's book, that the point in *Carrick* v. *Errington* [2 P. Wms. 361] was not ultimately decided, the settlement on which it depended being, on the hearing of the cause upon further directions, declared to be fraudulent and void.

[1] Part only of the case is here given.

TARBUCK *v.* TARBUCK.

CHANCERY. 1835.

[*Reported* 4 *L. J. N. S. Ch.* 129.]

THE testator by his will devised certain hereditaments unto his son James for the term of his natural life, without impeachment of waste, and, immediately after his decease, then unto and equally amongst all the children of his said son James, share and share alike, and to their respective heirs and assigns forever as tenants in common; and if but one only child, then the said testator gave and devised the same to such only child, his or her heirs or assigns forever, chargeable as therein mentioned. And the said testator also gave and devised all his other messuages and dwelling-houses, buildings, lands, and hereditaments, whatsoever and wheresoever, unto his son Jonathan, for and during the term of his natural life, without impeachment of waste; and from and after his decease, then unto and equally amongst all the children of his said son Jonathan, lawfully to be begotten, share and share alike, or to their respective heirs and assigns forever, and for and during all his, the said testator's term and interest therein respectively, as tenants in common; and if but one only child, then the said testator gave and devised the same to such only child, his or her heirs or assigns forever, and for and during all his term and interest therein respectively, chargeable as therein mentioned; and in case his said son James should happen to die without leaving lawful issue, then he gave and devised the said hereditaments, so devised to him for his life as aforesaid, unto his, the said testator's, son Jonathan, his heirs and assigns forever; and in case his said son Jonathan should happen to die without leaving lawful issue, then the said testator gave and devised the said hereditaments so devised to him for his life as aforesaid, unto his, the said testator's, son James, his heirs and assigns forever, or for and during all his, he said testator's, term and interest therein respectively; *but if both his, the said testator's, said sons, James and Jonathan, should happen to die without leaving lawful issue*, then the said testator gave and devised the whole of the said messuages, hereditaments, &c., equally, unto and amongst all his, the said testator's, nephews and nieces, share and share alike, and to their respective heirs and assigns forever, or for and during all his, the said testator's, estate, term, and interest therein respectively, as tenants in common.

At the date of the will, neither of the testator's sons had any children, and they both died in the lifetime of the testator. James, one of the testator's sons, left one child, a son, who survived his father James and his uncle Jonathan, but who subsequently died in the lifetime of the testator, and Jonathan died without children. The testator died, seised of freehold estates, and possessed of leasehold for lives and

years, all of which were included in the above devise; and the question was, whether, under the circumstances, the devise over to the nephews and nieces took effect.

Mr. Pemberton and *Mr. Sharpe*, for the defendant, the heir-at-law.

Mr. Bickersteth and *Mr. Rogers*, for the plaintiffs, the nephews and nieces; *Mr. Kindersley*, for other defendants, also nephews; and *Mr. Ellis*, for other defendants, also nephews and nieces.

The Master of the Rolls. [Sir C. C. Pepys.] It appears that the testator's son James died in 1814, leaving a son, James; the testator's son Jonathan died in 1824 without issue. James, the son of the testator's son James, died in 1824, and the testator himself died in 1831; so that the devises in favor of the testator's sons, James and Jonathan, and their children, lapsed and failed. On the part of the nephews and nieces it was contended, that, in the events which have happened, they are entitled under the devise to them. On the part of the heir-at-law of the testator, it was contended, that as the events have not happened upon which alone the nephews and nieces were to be entitled, the devise to them cannot take effect, and that therefore there is an intestacy.

The first question to be considered is, What estates would James and Jonathan have taken, had they survived the testator? [The discussion of this first question is omitted.] I am therefore of opinion, that if James and Jonathan had survived the testator, they would have taken estates for life, with remainder to their children in fee, but with executory devises over, in the event of their leaving no children at the times of the death of the respective tenants for life; and if this be the true construction of the devise, it is clear the gift to the nephews and nieces could never have taken effect, for that gift is only to take effect in the event of James and Jonathan dying without lawful issue, that is, children to the above construction, and James, at the time of his death, had a son, namely, James, who survived both his father and his uncle Jonathan.

The only remaining question is, whether the circumstance of James, and his son, and Jonathan, having died in the testator's lifetime, makes any difference. The distinction is very nice between those cases, in which executory limitations have been held not to be defeated by the failure of a prior estate, as in *Avelyn* v. *Ward*, 1 Ves. Sen. 420; *Jones* v. *Westcomb*, Prec. Chanc. 316; *Murray* v. *Jones*, 2 Ves. & Bea. 313; and the opposite class of cases, in which it has been held, that subsequent limitations do not arise, although the preceding estates fail, because the event in which the estate was to go over had not arisen. The principle, however, is well established, although there has sometimes been some confusion in the application of it. It is, as I conceive, clear, that if James and Jonathan had survived the testator, the devise to the nephews and nieces could not have taken effect under the circumstances which happened; and it is, I think, established by authority, that the situation of the parties is not altered by their

having died before the testator. *Williams* v. *Chitty*, 3 Ves. 545; *Calthorpe* v. *Gough*, 3 Bro. C. C. 394, n.; *Doo* v. *Brabant*, 3 Bro. C. C. 392; s. c. 4 T. R. 706; and *Humberstone* v. *Stanton*, 1 Ves. & Bea. 385, are decided cases on this point. I am therefore of opinion that the event, on which the nephews and nieces were to take, did not happen; and that consequently there is an intestacy. The same declaration with regard to the leaseholds follows of course.[1]

EAVESTAFF *v.* AUSTIN.

CHANCERY. 1854.

[*Reported* 19 *Beav.* 591.]

THE testatrix devised and bequeathed all her real and personal estate to trustees, in trust to invest £4,500, and pay the interest thereof to her brother, William Johnson, during his life, and in case of his wife, Harriet Johnson, surviving him, she directed her trustees, immediately thereupon, to set apart a sufficient sum out of the £4,500 to pay Harriet Johnson, during her life, out of the dividends, &c., an annuity of £100; and that the remainder of the sum of £4,500 should, immediately upon her brother's decease, be equally divided between her nieces, Elizabeth Austin and Mary Austin. She then proceeded thus:—

"And I also direct, that in case my said brother shall survive his said wife [which happened], in that event, the same proportion of the £4,500 as I have directed to be divided between my said nieces, Elizabeth Austin and Mary Austin, shall, in that event, immediately after the decease of my brother, in the same way, be equally divided between them. And I further direct, that such proportions of the £4,500 as shall be set apart, in case my said brother shall die before his said wife, for securing to his wife for her life the sum of £100 per annum, or in case of his surviving his wife, so much of the £4,500 as would be equal to the production of £100 per annum, from the dividends, &c., thereof, shall, by my said trustees, immediately upon my said brother's decease, be set apart, and that my said trustees shall pay the said sum of £100 per annum to my granddaughter, Adelaide Dalton, for life; and I direct *that after her death*, the same shall be equally divided between the children of my nephew, John Austin."

By a codicil the testatrix revoked the £100 annuity given by her will to her granddaughter, Adelaide Dalton, "she being otherwise provided for."

The testatrix died in 1847; William Johnson survived his wife Harriet, and died in 1852 and Adelaide Dalton was still living.

[1] See, *accord.*, *Brookman* v. *Smith*, L. R. 6 Ex. 291; L. R. 7 Ex. 271 (1872).

The first question was, whether the bequest to the children of John Austin, of so much of the £4,500 as would produce £100 a year, was accelerated by the revocation of the bequest of the annuity of £100 to Adelaide Dalton for life, or whether its enjoyment by such children was postponed till the decease of Adelaide Dalton.

Mr. R. Palmer, for the plaintiffs, the surviving executors and trustees.

Mr. Lloyd, *Mr. W. Hislop Clark*, and *Mr. Joliffe*, for the several defendants.

On the question of acceleration, the case of *Lainson* v. *Lainson* was cited.

The Master of the Rolls reserved judgment.

The Master of the Rolls. [Sir John Romilly.] Though I think that the same rules which relate to real estate do not apply to personalty, and that therefore this case is distinguishable from *Lainson* v. *Lainson*,[1] still I think that the decision here, on the construction of this will, must be the same, and that it must be held that the interest of the children of John is accelerated. Without that, I do not see how I can avoid holding that it fell into the residue, which is given in another way. The interest of the children takes effect at once, without waiting for the death of Adelaide Dalton.[2]

HUGHES *v.* ELLIS.

Chancery. 1855.

[*Reported* 20 *Beav.* 193.]

The testator, by his will, dated in 1823, expressed himself as follows: "I direct that all my just debts, funeral expenses, the expenses of proving this my will, and all other expenses attendant thereon be first paid by my executrix, hereinafter named, out of my personal estate, and from and after the payment of the same, I give and bequeath the remainder of all my personal estate and effects, of what nature or kind the same may be, in manner following: *videlicet* — I give and bequeath to my mother, Anne Davies, the sum of one shilling. Also, I give and bequeath to my brother Hugh, and my sisters, Margaret, Anne, Elizabeth, Sarah, and Mary, each the sum of one shilling; I give and bequeath to my dear wife Mary the rest, residue, and remainder of all my estate, whether leasehold, real or personal, of what nature, kind, or quality soever the same may be, *and to her executors*, *administra-*

[1] 18 Beav. 1. A devise of land to A. for life and from and immediately after his death to B. in tail. A codicil revoked the devise to A. *Held*, that B.'s estate was accelerated. — Ed.

[2] The last part of this case, on another point, is omitted.

See also *Jull* v. *Jacobs*, 3 Ch. D. 703 (1876).

tors and assigns. But if my said wife should die intestate, then my will is, that the said remainder of my estate shall be bequeathed to my nephew David Hughes (son of my brother William), and to Margaret Evans (niece of my wife's first husband), share and share alike, their heirs and executors." He appointed his wife sole executrix.

Mary Hughes, the wife of the said testator, died intestate, on the 16th of September, 1854, in the lifetime of the said testator, and who died on the 23d of October, 1854.

The plaintiff Margaret Hughes (formerly Margaret Evans) by this bill claimed a moiety of the testator's residuary estate, under the bequest over to her and David Hughes.

To this bill the defendants Mrs. Ellis and Mrs. Parry demurred.

Mr. Eddis, in support of the demurrer.

Mr. Freeling, contra.

The Master of the Rolls. [Sir John Romilly.] My opinion of this will is, that the testator intended to give his wife an absolute interest in this property, with the power of absolutely disposing of it either in her lifetime or by will. If she did not dispose of it in her life or by will, he then intended these gifts over to take effect. No doubt the result is, that the gifts over could not take effect, for the wife took an absolute interest, and if she died without a will, the residue would go to her next of kin. She died, however, in the life of the testator, and I am of opinion that a lapse took place; the testator might have said "intestate in my life," but the simple word "intestate" excludes the construction that the gift over was intended by the testator to provide against a lapse, because if she had died in his lifetime, being a *feme coverte*, she had no power to do any testamentary act, by making a will, and she therefore must necessarily have died intestate.

I am of opinion that he intended to give her an absolute interest in the property, and if she did not dispose of it by will, the gift over was to take effect, and both upon principle and on the authorities which have been cited, such a gift over could not take effect.

The difficulty has been created by the testator; his estate ought, if possible, to bear the costs.[1]

[1] See *Greated* v. *Greated*, 26 Beav. 621 (1859).

"It is settled by authority that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will dispose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away, if he does not will it, that which he happened to have in his possession, or in his drawer, or in his pocket at the time of his death, shall not go to his heir-at-law if it is realty, or to his next of kin if it is personalty, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested *de facto* in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator. But that, I should have thought, did not apply to a case where the original gift never did take effect at all, because then there is no repugnance. There may be repugnance between the gift over and the gift intended to be made, but I am not quite sure that that ought to have

applied to a case, supposing the point arose, where there was simply the death of the person creating a lapse. True, there are two authorities cited of the late Master of the Rolls, *Hughes* v. *Ellis*, 20 Beav. 192, and *Greated* v. *Greated*, 26 Beav. 621, one of which seems to me very similar to this case. I think, if it were necessary for us to deal with these cases, I should be slow to express my assent to them." — *Per* JAMES, L. J., in *In re Stringer's Estate*, 6 Ch. Div. 1, 14, 15 (1877). But cf. 2 Jarm. Wills (4th ed.) 15.

"Where personal property is bequeathed to A. and the heirs of his body, and in case of failure of issue of A., then to B. (which, as is well settled, is an absolute gift to A., if he survive the testator), it is undetermined whether, if A. die without issue in the lifetime of the testator, the gift to B. will take effect. If we consider that the gift to A., if he survive the testator, is absolute only because the gift to B. is too remote, then, it would seem, since questions of remoteness are to be considered with regard to the state of facts at the death of the testator, and not at the date of his will, that the gift to B. is not open to the objection of remoteness, and is therefore good. In *Brown* v. *Higgs*, 4 Ves. 717; (and see *Mackinnon* v. *Peach*, 2 Keen, 555; *Donn* v. *Penny*, 1 Mer. 22, 23), Lord Alvanley seemed to entertain no doubt that the gift to B. would take effect, whether A. died without issue or not; but in *Harris* v. *Davis*, 1 Coll. 416, Sir J. K. Bruce, V.-C., thought such a gift bad." — 1 Jarm. (4th ed.) 351.

In *Andrew* v. *Andrew*, 1 Coll. 686, 690 *et seq.* (1845), it was *held*, that if a gift of consumable articles be made to A. for life, with a limitation over to B., and A.'s interest come to an end in the lifetime of the testator, the limitation over will not take effect.

CHAPTER VII.

CROSS LIMITATIONS.

SECTION I.

IMPLICATION OF CROSS LIMITATIONS.

SCOTT *v.* BARGEMAN.

CHANCERY. 1722.

[*Reported* 2 *P. Wms.* 68.]

ONE has a wife and three daughters, A., B., and C., and being possessed of a personal estate, devises all to his wife, upon condition, that she would immediately after his death pay £900 into the hands of J. S. in trust to lay out the same at interest, and pay the interest thereof to his wife for her life, if she shall so long continue a widow; and after her death or marriage, in trust that J. S. shall divide the £900 equally among the three daughters, at their respective ages of twenty-one, or marriage, *provided that if all his three daughters should die before their legacies should become payable, then the mother*, whom the testator also made executrix, should have the whole £900 paid to her.

The wife pays the £900 to J. S. and marries a second husband, viz., the defendant Bargeman; the two eldest daughters die under age and unmarried; the youngest daughter attains twenty-one; and the question being, whether she was entitled to all, or what part of the £900.

LORD CHANCELLOR [MACCLESFIELD]. The youngest daughter is entitled to the whole £900, by virtue of the clause in the will, which says, "if all the three daughters shall die before their age of twenty-one or marriage, then the wife shall have the whole £900;" for this plainly excludes the mother from having the £900 or any part of it, unless these contingencies shall have happened, and the share of £300 apiece did not vest absolutely in any of the three daughters under age, so as to go, according to the Statute of Distributions, to their representatives, in regard it was possible all the three daughters might die before their ages of twenty-one or marriage, in which case the whole £900 is devised over to the mother; consequently the whole £900 does now belong to the surviving daughter the plaintiff.[1]

[1] See *Graves* v. *Waters*, 10 Ir. Eq. 234 (1847).

ARMSTRONG *v.* ELDRIDGE.

CHANCERY. 1791.

[*Reported* 3 *Bro. C. C.* 215.]

THE testator gave the residue of his real and personal estate to trustees, in trust to sell and apply the interest, proceeds, and profits thereof from time to time, to the use of his grandchildren, Frances Armstrong, Charlotte Armstrong, Rebecca Armstrong, and Mary Armstrong, equally between them, share and share alike, for and during their several and respective natural lives: and from and immediately after the decease of the survivor of them, in trust to pay and apply the principal money, to, and among all and every, the children of his said granddaughters, equally to be divided between them, share and share alike.

Two of the granddaughters were now dead, leaving children. The question was, what should become of the interest which the two deceased granddaughters took, until the death of the survivor. The children of the deceased grandchildren claimed them, their mothers being tenants in common, therefore, there being no survivorship.

But, LORD CHANCELLOR [THURLOW] said, that though the words "equally to be divided," and "share and share alike," were, in general, construed, in a will, to create a tenancy in common, yet, where the context shows a joint-tenancy to be intended, the words should be construed accordingly; and that, in this case, it was evident that the interest was to be divided among four, while four were alive: among three, while three were alive; and nothing was to go to the children, while any one of their mothers were living; and declared the whole interest to belong to the two living granddaughters, by survivorship.

DOE d. BORWELL *v.* ABEY.

KING'S BENCH. 1813.

[*Reported* 1 *M. & S.* 428.]

EJECTMENT for certain freehold lands in the parish of Grasby, in the county of Lincoln. A verdict was found for the plaintiff before *Grose*, J., at the last assizes for the said county, subject to the opinion of the court upon the following case: —

William Borwell being seised in fee of the premises in question by his will dated the 6th of April, 1777, after devising all his messuages, cottages, lands, tenements, and hereditaments, &c., to his wife for and

during her widowhood, or until such child as he should happen to have by her should attain twenty-one, remainder to trustees during the continuance of such estate to preserve contingent remainders, remainder to the use of all and every his sons and daughters on the body of his said wife, begotten or to be begotten, and the heirs of the body of such sons and daughters severally and respectively as tenants in common and not as joint tenants; and in case any of such sons or daughters should happen to die without issue, the share of him, her, or them, so dying without issue, to the use of the survivors or survivor, and of the heirs of his, her, or their bodies as tenants in common and not as joint tenants; and for default of such issue he devised thus: "I give and devise all my said messuages, cottages, lands, tenements, and hereditaments unto my three sisters, Elizabeth Richardson, Mary Whitehead, and Sarah Borwell, *for and during their joint natural lives and the natural life of the survivor of them, to take as tenants in common and not as joint tenants.* And from and after the determination of their *respective* estates, then to my said trustees and their heirs during the *respective lives of my said three sisters and the life of the survivor of them,* upon trust, by the ways and means aforesaid, to preserve the contingent estates hereinafter limited from being defeated or destroyed; and from and after *the respective deceases of my said three sisters and the decease of the survivor of them*, then as to one undivided third part of the said premises to the use of my nephew and niece, John and Mary Richardson, son and daughter of my sister, E. Richardson, respectively for and during their respective lives as tenants in common and not as joint tenants:" remainder to trustees to preserve contingent remainders; remainder after the respective deceases of the testator's said nephew and niece, to the use of the children of the said nephew and niece in tail general, with remainders over. And as to another undivided third part from and after the deceases of his said three sisters and the survivor of them, to the use of the children of M. Whitehead in tail general, with other remainders over. And as to the remaining undivided third part from and after the respective deceases of his said three sisters and the survivor of them, to the use of the children of S. Borwell, with other remainders over. The will also contained a bequest of personal property to the three sisters in the following terms: "I give and bequeath to my said three sisters the sum of £20 apiece, to be paid to them respectively by my executrix hereinafter named, within 12 calendar months next after my decease. And my will is that in case any of my said three sisters shall happen to die before her or their legacy or legacies shall become payable as aforesaid, that then the legacy or sum of money hereby intended for her or them on her or their so dying (whether the same be originally given or shall afterwards come to her or them by survivorship, in pursuance hereof), shall go to and be equally divided among the survivors of them if more than one: but if but one, to such survivor only." — The testator appointed his widow sole executrix of his will. M. Whitehead

died without issue in 1778, in the lifetime of the testator. The testator died seised on the 20th of June 1783, without issue, and without altering or revoking his will; upon whose death his widow entered, and continued to hold the premises until her second marriage in 1790; when the lessor of the plaintiff and E. Richardson, the two surviving sisters of the testator, took possession and demised the premises to the defendant, who paid rent to them in moieties. E. Richardson died some years ago, and after her death, the defendant married her daughter, M. Richardson mentioned in the will, and has continued to pay rent for a moiety of the premises to the lessor of the plaintiff. J. Richardson, the testator's nephew, also mentioned in the will, died without issue in his mother's lifetime. The defendant was in possession of the premises when the ejectment was brought, but had been regularly served with a notice to quit by the lessor of the plaintiff; at the expiration of which notice the possession of the whole of the premises was demanded and refused. The defendant entered into the common consent rule to defend without confessing ouster, unless an actual ouster of the lessor of the plaintiff should be proved; and no actual ouster of the lessor of the plaintiff was proved, except as above stated. The question for the opinion of the court is, whether the plaintiff is entitled to recover.

Copley, for the lessor of the plaintiff.

J. Bulguy, contra.

Lord Ellenborough, C. J. This is the case of a testator who has unfortunately fallen into the use of technical expressions which he did not fully comprehend. It remains for us to say, whether amidst this cloud of obscurity which he has thus raised, we can collect his meaning. I think the cardinal point, upon which we may rely in order to collect his intention, turns upon the words preceding the limitation over and upon which it is given, which are these, "from and after the respective deceases of my said three sisters, and the decease of the survivor of them." That is the time, and it is not before that time, when the remainder over is to take effect. Now, unless the sisters take by survivorship, what is to become of the respective portions of the estate in the interval? The learned counsel has suggested, that the heir would take them as special occupant; but it seems to me, that there is no occasion to resort to such an expedient; for the whole will is made intelligible by construing the words, to take as tenants in common, as rather regulating the mode of enjoyment, than as describing the precise estate which the sisters should take. The words are, "unto my three sisters for and during their joint natural lives and the natural life of the survivor, to take as tenants in common, and not as joint tenants." To take as tenants in common is, correctly speaking, repugnant to taking with benefit of survivorship; but if those words are understood to mean that they were to enjoy it as tenants in common, which they might do with benefit of survivorship, then the only repugnancy seems to be in the words, "and not as joint tenants." I

would preserve the words to take as tenants in common; the words tenants in common are of flexible meaning, and may be understood, that although they should take by survivorship as jointenants, yet the enjoyment was to be regulated amongst them, as tenants in common. The prevailing intention of the testator seems to have been that the estate should not go over until the death of the survivor. The words upon which I commented and relied in the outset, clearly manifest such an intention.

GROSE, J. I think the construction which my Lord has put on the will comes the nearest to the testator's intention.

LE BLANC, J. The testator having restrained the limitation over "until after the death of the survivor," makes the case somewhat different from what it would have been, if the devise had been confined to the sisters themselves. In the cases cited for the defendant, there were no limitations over to help the construction. The bequest of the personalty is properly prayed in aid as a key to the meaning of the testator, that he intended that the sisters should also take the real estate in survivorship.

BAYLEY, J. The fair construction is to treat it as a devise to the sisters as tenants in common with benefit of survivorship, and thereby give effect to all the words. A tenancy in common with benefit of survivorship is a case which may exist, without being a jointenancy; because survivorship is not the only characteristic of a jointenancy. There is one view in which it might be important to the testator to create a tenancy in common with survivorship, and yet not a jointenancy. It might be important in this view, because if it were a jointenancy, one jointenant might, by means of a lease made during her life, convey to her lessee a title paramount to that of the survivors. It might therefore be the object of the testator to obviate such a consequence, which would in effect defeat his intention.

Postea to the plaintiff.[1]

DOE d. GORGES *v.* WEBB.

COMMON PLEAS. 1808.

[*Reported* 1 *Taunt.* 234.]

IN this ejectment, which was tried at the Monmouth Spring Assizes, 1808, before *Graham*, B., a verdict was found for the plaintiff, subject to the opinion of the court, upon a case, which stated that Frances, the wife of Thomas Fettiplace, being seised in fee of the moiety of certain manors and estates in the county of Monmouth, and no others, and having power to dispose of them by writing in nature of a will, in the due execution of such power devised the same by the descriptions of all that her moiety of the several manors therein named, and her

[1] See *Cranswick* v. *Pearson*, 31 Beav. 624 (1862).

moiety of all manner of tithes of grain in certain parishes enumerated, and all other her manors, messuages, lands, tenements, and hereditaments whatsoever, situate in the county of Monmouth, or elsewhere in Great Britain, to her husband for his natural life, and after his decease she devised all her said moiety of the manors, messuages, lands, tenements, hereditaments, and other the premises unto her youngest son Charles Fettiplace for his natural life; and after the determination of that estate, to the use and behoof of John Lord Chedworth and his heirs for the natural life of the said Charles Fettiplace, upon trust for preserving the contingent remainders; and after the decease of the said Charles Fettiplace, she gave the same moiety of the said manors, messuages, lands, tenements, and hereditaments, and other the premises to his first and other sons, and to the heirs male of their bodies, severally, successively, and in remainder; and in default of such issue she gave the same moiety to his daughter and daughters as tenants in common, and to the heirs of their bodies; and in default of such issue she gave the same moiety to her eldest son Robert Fettiplace for his natural life, with remainder to the same trustee to preserve the contingent remainders; and after the decease of the said Robert Fettiplace she gave the same moiety to his first and other sons, and to the heirs male of their bodies successively; and in default of such issue she gave the said moiety of the same manors and premises to his daughter and daughters as tenants in common, and to the heirs of their bodies; and in default of such issue she gave the said moiety of the same manors and premises to her three daughters Frances Fettiplace, Mary Fettiplace, and Arabella, and to the heirs of their bodies respectively, as tenants in common; and in default of such issue, she gave the same to her own right heirs forever. The case then stated the death of the testatrix and of several of the devises and those claiming under them, and stated the result to be, that unless cross remainders were created or implied by the devise in the will of Mrs. Fettiplace to her daughters and to the heirs of their bodies, the lessors of the plaintiff were entitled to 25 undivided three hundred and sixtieth parts of the premises. If cross remainders were created by that devise, the lessors of the plaintiff were not entitled; and in that case a nonsuit was to be entered.

Williams, Serjeant, in support of the verdict.

Lens, Serjeant, *contra*, was stopped by the court.

Mansfield, C. J. It has been truly said, that the ancient doctrine on this subject has been broken in upon; but it is wonderful how it ever became established. The method to bring the estate all together, is to imply cross remainders. Here the testatrix devises her moiety of her several manors and lands, and all her moiety of her tithes, &c., treating it as one entire subject of devise, to her husband in the first place. She then adds several devises over, and in each of them she studiously describes her estate by the most collective and comprehensive terms, and devises all that she had before devised, to her sons, and their sons, and their daughters, in succession. Afterwards, in

default of such issue, she gives the same moiety to her three daughters, and the heirs of their bodies, as tenants in common, and not as joint tenants; and in default of such issue (not thereby meaning her daughters, for to them she gave estates respectively, but the heirs of their bodies), she gives the *same* to her own right heirs. What was the same? It is evident from every preceding devise, that the same was the whole. She had in no part of her will disposed of less than the whole. It is plain then that it was not her intention that a part should go to her heir-at-law, but the whole: she has given him nothing, unless the issue of all her daughters should fail, when the heir-at-law was to take anything, he was to take the whole estate. Much stress has been laid on the word *respectively* by judges of great name. How the use of that word could make any difference in construing the meaning of the testator, it is difficult to discover; for if the word is omitted, the sense continues the same: a devise to two as tenants in common, and to the heirs of their bodies, must necessarily mean, to the heirs of their respective bodies. And yet the case of *Phiphard* v. *Mansfield*, Cowp. 797, at the time when it was adjudged, was considered by many lawyers as a very strong determination.

HEATH, J. I am for adhering to the modern decisions, as being most agreeable to reason and good sense. Great uncertainty would be introduced by overturning them; and it is of the utmost importance that the rules of law affecting the disposition of real property should be known and certain.

LAWRENCE, J. Lord Kenyon in the case of *Watson* v. *Foxon*, 2 East, 36, and Lord Mansfield in that of *Wright* v. *Holford*, Cowp. 31, declared that they could not understand what Lord Hardwicke meant by relying on the word respective. In the case of *Roe* v. *Clayton*, 6 East, 628, which has not been cited, the word respective was not introduced into the devise, but the court determined that cross remainders were created, principally on account of this circumstance, that it was a devise of *all* the testator's estate. They collected from this, that it was the testator's design that it should all go over together. In the present case the testatrix, by referring so frequently to the *same moiety*, and using that phrase throughout the will, shows that she meant nothing to go over, unless all went. The whole was to pass to her heirs together. It therefore must have been the intention of the testatrix, to create cross remainders, for she could not otherwise effectuate her object. As to the word *respectively*, the cases which have founded themselves on the distinction of that expression must now be considered as having been overruled. What Lord Kenyon said in the case of *Watson* v. *Foxon*, 2 East, 36, merely amounted to this, that the only thing necessary in order to imply cross remainders was to ascertain the intention of the testator: no technical words are required.

CHAMBRE, J. I am of the same opinion. I wonder, as my Lord does, how the old doctrine ever became established. The oldest case

is that in Dyer, 303 *b*, and there, no difficulty was found in giving cross remainders by implication among five; that was not a stronger case than this. It was necessary there, in order to effectuate the testator's apparent intent, that all the tenants in tail should take by cross remainders. So here, the testatrix devises over the remainder of *all her moieties* to her daughters as tenants in common, and the heirs of their bodies: she then gives the *same* to her right heirs; but it is impossible that the whole should at once go over to her heir, without either devesting estates which are *in esse*, or supposing, what is almost impossible, that all the tenants in tail should die at one moment. Therefore cross remainders must be implied here.

Let the postea be delivered to the defendant.

SKEY *v.* BARNES.

CHANCERY. 1816.

[*Reported* 3 *Mer.* 335.]

JOHN BROCKHURST by his will devised his real estates to the defendant Barnes and another (whom he also appointed executors of his will) and their heirs, during the life of his daughter Eleanor (wife of the defendant James Skey), upon trust, during her life, to pay the rents and profits to her separate use; with remainder to the use of her first and other sons in tail-male; in default of such issue to the use of all and every her daughters as tenants in common in tail with cross remainders; and for default of such issue to the use of his nephew Thomas Brockhurst in fee. He also gave and bequeathed to his said trustees, their executors, &c., all his personal estate and effects, in trust to sell, and invest the produce on real or government securities, and to pay the interest to his daughter Eleanor during her life for her separate use; and after her decease, "to pay and divide the whole of the said trust moneys to and amongst all and every the child or children of the body of my said daughter lawfully to be begotten and the lawful issue of a deceased child," in such proportions as his said daughter should by will appoint; and in default of appointment then the same "to go to and be equally divided between them share and share alike, and, if there should be but one child, then to such only child; the portion or portions, parts or shares of such of them as shall be a son or sons to be paid at his or their respective ages of twenty-one, and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective ages of twenty-one or days of marriage first happening; but, in case there shall be no such issue of the body of my said daughter, or all such issue shall die without issue, before his or their respective portions should become payable as aforesaid," then £1000 for his sister Mary and her family, as therein mentioned; and, as to

£1500, for his niece Ann Wells and her family, in like manner; and in case there should be no issue of either, for his said nephew Thomas Brockhurst, whom he also made his residuary legatee. The will contained a proviso that it should be lawful for the trustees, &c., to pay and apply the interest of the respective children's portions towards their education and maintenance until their respective portions should become payable.

The testator died after making his will, leaving the said Eleanor Skey, his only child, who received the interest, &c., of the personal estate for her life, and died on the 18th of December, 1794, intestate, and having made no appointment, leaving the defendant James Skey (her husband), the plaintiff (her son), the defendant Mary Skey, and Frances, Sarah, and Elizabeth Skey (all since dead), her daughters, her surviving; of whom Elizabeth died in January, 1811, under twenty-one, unmarried and intestate; Sarah died in October, 1811, having attained twenty-one, and having by her last will appointed the defendants George Skey and Mary (her sister) executor and executrix; and Frances died in 1813, intestate and unmarried, but having attained twenty-one. Administration both to Elizabeth and Frances, was taken out by the defendant James Skey, their father.

The question was as to the share of Elizabeth (who had died under twenty-one and unmarried), to which the plaintiff claimed to be entitled, together with the defendant Mary and the representatives of Sarah and Frances, respectively, by right of survivorship.

The defendant James Skey (the father), on the contrary, insisted that the share of Elizabeth was a vested interest, transmissible to her personal representatives, and he claimed to be entitled to it by having taken out administration.

Hart, *Bell*, and *Dowdeswell*, for the plaintiff.

Sir Samuel Romilly, *Agar*, and *J. Martin*, for the defendants.

The Master of the Rolls. [Sir William Grant.] Upon the face of the will, and independently of authority, I should have found little difficulty in deciding this case. I should have said, The shares of the residue are so given as to vest immediately in the children of the daughter, though liable to be divested by their all dying without issue under twenty-one. The contingency on which they were to be divested has not happened. They therefore continued vested, and the share of a child dying under twenty-one passes to its representative. But it was said that such a decision would be in contradiction to the authority of *Scott* v. *Bargeman*, 2 P. W. 69, and of *Mackell* v. *Winter*, 3 Ves. 536. I shall show hereafter that this case cannot be affected by the last of these decisions. As to the first, though I think the decision right in its result, I doubt much whether the reporter can have correctly stated the reason on which it was grounded; for it seems to imply a proposition that is untenable in point of law, namely, that the mere circumstance of all the shares being given over on a contingency does, of itself, and without more, prevent any of the

shares from vesting in the mean time. I take it to be clear, that a devise over upon a contingency has no such effect, provided the words of bequest be, in other respects, sufficient to pass a present interest. Such a devise over of the entirety may indeed be called in aid of other circumstances to show that no present interest was intended to pass; and there is another question I shall presently mention, on which it may very materially bear. But, that it is alone sufficient to prevent vesting, cannot, I think, be maintained.

In *Ingram* v. *Shephard*, Amb. 448, the point was indeed made; but Lord Northington with great clearness decided against it. There, a residue of real and personal estate was given to the children of Frances Shephard; but it was to go over if she died without leaving issue. The children that had come into *esse*, filed a bill for the rents and profits of the residuary estate. "The devisees over contended that the children took no interest in the *residuum* in the life of their mother, but that the whole was contingent till her death; and that the interest and profits were intended to accumulate in the mean time."

"Lord Northington was very clearly of opinion, that the daughters took a defeasible interest in the residue; and put the case of a legal devise of the residue to the daughters, with a subsequent clause, declaring, that if all the daughters should die in the lifetime of their mother, then the residue should go over; that would be an absolute devise with a defeasible clause, and the daughters would, in that case, be clearly entitled to the interest and profits till that contingency happened. And decreed according to the prayer of the bill, with liberty to apply in case of the birth of any other child."

I have said that I thought the decision of *Scott* v. *Bargeman* right in its result, though not for the reason assigned. There was no gift to the daughters, but in the direction to the trustee to divide the fund among them at their respective ages of twenty-one years. The age of twenty-one was therefore part of the description of the legatees among whom the division was to be made.

On that principle, Lord Rossyln, after consideration, and looking into the authorities, decided the case of *Batsford* v. *Kebbell*, 3 Ves. 363. There, the testatrix gave to A. the dividends that should become due after her decease upon £500 three per cent bank annuities, until he should arrive at the full age of thirty-two years, at which time she directed her executors to transfer to him the principal sum of £500 of her three per cent annuities for his own use. A. died before he attained thirty-two; and the question was, whether the vesting of the legacy, or the time of payment only, was postponed till the legatee should attain the age of thirty-two. The Lord Chancellor (Loughborough) said it struck him that there was a very precise distinction in that case between the dividends and the fund, and that, if he construed it a gift of the fund, he must strike at the suspension of it till the age of thirty-two; and afterwards, upon reading over the bill and looking at the cases, said he was confirmed in his opinion, adding as follows: "Upon

the cases it appears that dividends are always a distinct subject of legacy, and capital stock another subject of legacy. In this case there is no gift but in the direction for payment; and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description. In all the other cases the thing is given, and the profit of the thing is given."

If Lord Macclesfield, in *Scott* v. *Bargeman*, had upon this ground decided that the legacies did not vest in daughters under twenty-one, the circumstance that all the shares were given over on the death of all under twenty-one might bear very materially on the question that would then arise, whether the survivors would be entitled to the share of a daughter dying under the prescribed age. *Prima facie* there was no survivorship, as the shares were given equally. Yet the share of a daughter dying under twenty-one could not be said to be undisposed of, so as to sink into the residue, or go to the testator's next of kin, for there was an event in which the devisee over might become entitled to it. Therefore, as the mother was to be entitled to the whole if all died under twenty-one, and yet was entitled to nothing unless all did die under twenty-one, survivorship among the children themselves seems to be implied, though not provided for in words; and it is here, and here alone, that the analogy from cross remainders has any application. It has no bearing whatever on the other and primary question, whether the shares do or do not vest. That is a question which cannot arise in cases of cross remainders. The only estates that are given, namely, estates tail, do vest. The question is, what is to become of each portion of the property, as each estate tail determines. If the limitation over is not to take effect till a failure of the issue of all the devisees in tail, and if the whole is then to go over, an inference arises, that, in the mean time, the several devisees in tail are to succeed to each other. But, with respect to personal property, if a share once vests, though liable to be divested on a contingency, the question of reciprocal succession or survivorship never can arise. If the contingency happens, the share goes over; if the contingency does not happen, the share remains vested, and passes to representatives.

In the case of *Mackell* v. *Winter*,[1] although Lord Rosslyn uses some

[1] 3 Ves. 536. There the testatrix directed her household goods, &c., to be sold, and the produce, together with the residue of her personal estate, she bequeathed to her two grandsons and her granddaughter, "to be equally divided between them share and share alike; the shares of her grandsons, with the interest and accumulations, (after a deduction for maintenance and advancement,) to be paid to them respectively upon their attaining their ages of twenty-one, and the share of her granddaughter, with the interest and accumulation, at twenty-one or marriage." Then, after a direction for maintenance and advancement, she declared that in case her granddaughter should die under twenty-one and unmarried, her share should go to and be equally divided between her grandsons; and in case of the death of either of them, the whole should be paid to the survivor; and that, in case either of her said grandsons should die under twenty-one, the share of her said grandson so dying should go to the survivor; and, in case both her grandsons should die under twenty-one, and her granddaughter should

expressions not unlike those which are attributed to Lord Macclesfield in *Scott* v. *Bargeman*, yet there is not to be found in his judgment anything like a distinct proposition that, by the devise over, without more, the vesting was prevented. He makes two questions: — First, whether the shares vested. If they did, there was an end of the granddaughter's claim: the representative of the surviving grandson was entitled. If they did not, still there was a second question to be considered: whether the granddaughter was entitled to the whole by survivorship, there being no provision for survivorship in the case that had happened. And it is to this second question that Lord Rossyln (after having decided upon all the grounds which the will furnished, taken together, that the shares did not vest) principally applies the argument drawn from the mode in which the shares are given over. But what are the grounds on which he holds the shares not to have vested? Not merely because they are given over — but because he thought it apparent from different provisions in the will, that the testatrix did not mean any of the legatees to take an interest in the residue before twenty-one, except in so far as the executors were authorized to make an expenditure for maintenance or preferment. Everything beyond what might be wanted for those purposes was to be accumulated. Until twenty-one, none of them was to have any right to the accumulation; and, if they all died under twenty-one, the residue with the accumulations was to go over to the testatrix's nephew. That, to be sure, was inconsistent with the notion of a vested interest in a residue, which entitles the legatee to the produce of such residue, even when the payment is postponed till twenty-one. But in the present case, there is not a single circumstance or expression in the will, that has been relied upon, as showing an intention to defer the vesting, excepting the bequest over. The directing payment to be made at twenty-one does not postpone vesting, even in the case of a common legacy, still less in the case of a residue. There is, indeed, a clause authorizing the executors to apply the interest and dividends of the children's portions for their education, maintenance, or other benefit or advantage; but there is nothing that can exclude their right to the surplus of income that might not be so employed; nor is there anything that could entitle those who were to take in the event of all the children's dying without issue under twenty-one, to claim the surplus interest and produce of the residue during the lives of those children. Not one word is said about survivorship among the children; whereas, in *Mackell* v. *Winter* there was an anxious provision for survivorship in all the cases that had occurred to the testatrix,

die under twenty-one and unmarried, the whole of their respective shares should go over.

The two grandsons died under twenty-one; the granddaughter married. The Master of the Rolls declared the plaintiff (who was the devisee over) entitled to the two-thirds, and the granddaughter to her one-third only. But, on appeal, the decree was reversed and the granddaughter declared entitled to the whole, upon the ground of *necessary implication*. — Rep.

and it was evident that it was by a mere slip that it was not provided for in the case that actually happened.

On the whole, the present case comes round to what is stated at the outset — namely, that the shares vested from the beginning, — that the contingency has not happened on which they were to be divested, — consequently the share of the deceased child has been properly paid to her representative.[1]

JONES *v.* RANDALL.

CHANCERY. 1819.

[*Reported* 1 *Jac. & W.* 100.]

WILLIAM JONES, by will dated the 16th August, 1811, gave his leasehold estates to his executors, upon trust, out of the rents and produce, to pay an annuity of £450 to his daughter Mary Ann Randall, the wife of William Randall, for her life, and after her death upon trust to pay and divide the said annuity or yearly sum unto, between, and amongst all and every the children of his said daughter Mary Ann, who should happen to survive her, in equal shares and proportions, if more than one child; and if but one child, then to pay the said annuity to such only child; such annuity to be paid, during the lives of such children of his said daughter, and the life of the survivor of them.

The testator died soon after making his will; Mary Ann Randall died in 1813, leaving four children. One of these afterwards died, and the father, W. Randall, took out administration to him. The bill was filed by the executor against W. Randall and the three surviving children, for the purpose of having their rights to the deceased child's share of the annuity declared.

Mr. Simons, for the plaintiff.

Mr. Wilbraham, for the three children.

Mr. Norton, for the defendant, W. Randall.

THE MASTER OF THE ROLLS. [SIR THOMAS PLUMER.] We cannot tell what the testator intended, except so far as he has expressed it. The safest way is to adhere to the words, and they are perfectly clear in describing to whom the annuity was to go after the death of M. A. Randall. It was there given to all the children who should survive her, in equal shares and proportions; this would make them tenants in common; and accordingly, the four children who survived were entitled to take it as tenants in common.

The words that follow only describe how long this annuity is to last: they determine the subject-matter of the bequest, regulating the duration, but not the persons who are to participate in it.

It is only a conjecture, that because the annuity is for the lives of the

[1] See *Beauman* v. *Stock*, 2 Ball & B. 406 (1814).

survivors, therefore the survivors are to enjoy it. That would be raising an inference against the express words; the court cannot make a construction contrary to the expressions of the first part, unless there be in it a necessary incompatibility with that which follows.

The share of the child that is dead, must therefore be given to the father.[1]

ASHLEY *v.* ASHLEY.

CHANCERY. 1833.

[*Reported* 6 *Sim.* 358.]

By an order[2] in this cause the master was directed to inquire what interest the testator had in a certain estate in London. The master found that James Lewer, being seised in fee of said estate, died in 1773, and by his will devised said estate to his wife for life, remainder to preserve contingent remainders, remainder to his daughter, Sarah Chandler, for life, remainder to trustee to preserve &c., and after her death to "all and every the child or children" of Sarah Chandler "equally to be divided between them, if more than one, share and share alike, and to take as tenants in common and not as joint tenants, and for want of such issue of Sarah Chandler" then to his daughter Mary H. and for life with like remainders to her children, remainder to Thomas Chandler in fee. The residue of his estate, real and personal, he gave to his wife in fee and absolutely.

Sarah Chandler had eight children living at the death of James Lewer or born afterwards. Five of them had died without issue, but three were living.

The master reported that all the limitations in the will failed, subsequent to the devise to the child or children of Sarah Chandler, as being only to take effect in case there never was any such child; and that the children of Sarah Chandler took life estates only without cross remainders between them; and that, subject thereto, the fee simple of the houses passed, by the general residuary devise, to the widow of James Lewer, the testator.

Mr. Knight and *Mr. Daniell,* in support of the exception.

Mr. Pepys and *Mr. Ching*, for persons claiming under Mrs. Lewer, the residuary devisee, in support of the report.

THE VICE-CHANCELLOR. [SIR LANCELOT SHADWELL.] My opinion is directly against the finding of the master. — [His Honor here read the devise, and then proceeded thus:] — Now but one subject is given throughout. The expression, "for want of such issue," means want of issue whenever that event may happen, either by there being no chil-

[1] See *Bryan* v. *Twigg*, L. R. 3 Ch. 183 (1867).

[2] The following statement is substituted for that in the report.

dren originally, or by the children ceasing to exist. Those words seem to me to create cross remainders by implication.

Declare that the children of Mrs. Chandler took estates for life, as tenants in common, with cross remainders between them for life, with remainder to Mrs. Hand for life, with remainder to her children, as tenants in common for life, with cross remainders between them for life, with remainder to Thomas Chandler in fee: and refer it back to the master to review his report.

DRAYCOTT *v.* WOOD.

CHANCERY. 1863.

[*Reported* 8 *L. T. N. S.* 304.]

GEORGE WOOD, by his will, dated Nov. 27, 1817, gave his residuary real and personal estate to trustees upon trust, as to a moiety of the annual produce, to pay and apply the same unto and amongst his brother John Wood, his sister Elizabeth Elkin, and his niece Ann Cotton, as the same should become due, equally, share and share alike during their lives, with a bequest over as to the share of the said John Wood; and the will continued: "And from and after the decease of the said Elizabeth Elkin, upon trust to pay her undivided share arising as aforesaid unto and amongst her two sons and three daughters, Thomas Elkin, George Elkin, Sarah Elkin, Elizabeth Knight, and Hannah Hallam, equally to be divided amongst them for their respective lives, share and share alike, as tenants in common; and upon and from and after the decease of the said Thomas Elkin, George Elkin, Sarah Elkin, Elizabeth Knight, and Hannah Hallam, upon trust to pay their third share of and in the produce arising as aforesaid unto and between George Wood and John Wood" (nephews of the testator, and to whom he had given the ultimate interest in the former share) "and their personal representatives, equally, share and share alike in a due course of administration; and upon and after the decease of the said Ann Cotton upon trust to pay and apply her third share arising as aforesaid unto and amongst all and every the child and children of the said Ann Cotton who should be living at her death, equally to be divided amongst them, share and share alike, for their benefit and advantage during their natural lives, and from and after their decease upon trust to pay such third share arising as aforesaid unto the said George Wood and John Wood and their personal representatives equally, share and share alike." A suit was instituted for the administration of the trusts of the testator's will, and by an order made in that suit on further consideration, on 31st May, 1856, it was declared (amongst other things) that, according to the true construction of the will of the said testator, and in the events which had happened, the above-mentioned moiety of

his residuary estate had become absolutely vested in John Wood (the nephew), one of the defendants in this suit, subject, as to one-third part of the said moiety, to the life-interest of the said Elizabeth Knight, who had become entitled to such life-interest as the survivor of the two sons and three daughters of the testator's sister, the said Elizabeth Elkin, deceased, "and also subject to the life-interest of the said Ann Cotton" (then a defendant), "and to the life-interest of all and every the child and children of the said Ann Cotton who should be living at her death, and of the survivors and survivor of such child or children, and to the rights and interests of any parties claiming under them respectively as to such life-interest." Ann Cotton died April 26, 1858, leaving three children, and by another order made in the suit on the petition of Mary Ann Pickard, one of the said three children, and her husband, one-third of the dividends to which Ann Cotton had been entitled for life was ordered to be paid to the petitioners during the life of the said Mary Ann Pickard, or to her as survivor, or until further order.

Since the date of the last-mentioned order one of the three children of Ann Cotton had died, having mortgaged his one-third share to James Glover, and the case now came on by summons adjourned from chambers, on the application of Mary Ann Pickard and her husband, "that a moiety of the dividends henceforward to accrue due on the share to which Ann Cotton had been entitled might be paid to them instead of the one-third part of such dividends directed to be paid to them by the last-mentioned order."

De Gex, in support of the application.

Cracknell, for Glover, the mortgagee.

Speed, for J. Wood, the nephew.

THE VICE-CHANCELLOR said that, whether or not he was bound by the former order in the suit was a question it was not necessary for him to determine; he would only observe that it was a very unusual thing to make a declaration of an interest ulterior to an existing life-interest. His judgment would rest upon the point of construction, as to which this case was governed by *Pearce* v. *Edmeades*, 3 Y. & C. 246. No doubt there was a marked difference between the gift to the children of Elizabeth Elkin and that to the children of Ann Cotton; that was to be explained by the fact that in the former case the children were there, and could be named, in the latter the members of the class could not be ascertained, they could only be described as a class. The rule therefore being, that where there is a gift to several *nominatim*, with a gift over, after the death of the same persons, still naming them, the interest will, notwithstanding that there are words of severance, go over as a whole, and that will be at the death of the last tenant for life, the present case would follow that rule; the fact that the takers are not named being accounted for as in this case. Thus the words "from and after their decease" would be construed as referring to successive deaths, as if the persons of the class had been named. The whole will showed the same intention; the nephews were favored legatees, and the object was,

that the property having passed through the hands of the tenants for life should come to them as a whole. This view would, as to the second point, whether the gift to the children of Ann Cotton was to be to them as joint tenants, or whether a clause of accruer was to be implied, be of much importance. The point had never been decided before, but some of the expressions of Lord Thurlow in *Armstrong* v. *Eldridge*, 3 Bro. C. C. 215, were in favor of the latter construction, "that it was evident the interest was to be divided among four while four were alive, three while three were alive," &c. But this intention, if the gift were construed as a joint tenancy, would at once be frustrated by severance. In all these cases the presumed intention was that the property should continue in mass, passing through hands of the class to whom life-interests were given, to the ultimate taker, as a whole; so that, to construe this as a joint tenancy, liable to severance, and so to pass to the personal representatives of the tenant for life, would be against the intention on which the rule was based; each child was to take a share while living; on the death of each, his share survived by implication. The order would therefore be in the terms of the summons.

NOTE. — In *Maden* v. *Taylor*, 45 L. J. N. S. 569 (1876), a testator devised land "in trust for my nieces Mary, Betsey, Judith, and Sarah, and their assigns, during the term of their natural lives, equally to be divided amongst them as tenants in common, and from and after the decease of all or any of them my said nieces, then as to the part of her or them so dying in trust for all and every the child or children of them my said nieces respectively, and the heirs of their bodies lawfully issuing; and in case any of my said nieces shall depart this life without leaving lawful issue living at her or their decease, then in trust for the survivors or survivor of them my said nieces, and the heirs of her and their body and bodies lawfully issuing, and in case all of them my said nieces except one shall die without leaving lawful issue, then in trust for such only or surviving niece and the heirs of her body lawfully issuing, and in case of a total failure of issue of them my said nieces, then in trust for my own right heirs forever." SIR GEORGE JESSEL, M. R., *held* that cross remainders were to be implied between the children of the nieces.

Cross remainders will not be raised by implication in a deed, *Doe* d. *Tanner* v. *Dorvell*, 4 T. R. 518 (1794). 11 a

How far the expression of cross limitations in certain contingencies excludes their implication in other contingencies, is a question considered in *Vanderplank* v. *King*, 3 Hare, 1 (1843); *Rabbeth* v. *Squire*, 4 De G. & J. 406 (1859); *Atkinson* v. *Barton*, 3 De G. F. & J. 339 (1861); *In re Hudson*, 20 Ch. D. 407 (1882). Good case

SECTION II.

"SURVIVOR" CONSTRUED AS "OTHER."

HARMAN *v.* DICKENSON.

CHANCERY. 1781.

[*Reported* 1 *B. C. C.* 91.]

A BEQUEST to two daughters of the testator, and if one should die without issue, then to the surviving daughter and her issue. One of the daughters married and died, leaving issue; then the unmarried daughter died.

LORD CHANCELLOR [THURLOW] held that the money went to the issue of the married daughter, although she did not survive her sister.[1]

[1] The statement of this case is so very short and inaccurate, that it seems to require to be entirely new modelled. An exposition of it, therefore, from the Registrar's book, may be desirable.

The testator vested a sum of £10,000 New South Sea Annuities in trustees, with directions to suffer each of his two granddaughters, A. and B., to receive the dividends and interest to arise on £5000 part thereof, for her separate use; and, after the decease of each of such granddaughters, and when and as each of them should happen to die, to transfer and assign £5000 part of the said £10,000 New South Sea Annuities, unto and among such one or more of the children of each granddaughter so happening to die, who should be living at her decease, in such shares, &c., as his said granddaughter so dying should direct, &c.; and in default thereof, then in trust to assign, transfer, pay, and dispose of the said £5000 and the dividends thereof, unto or equally among all and every the children of his granddaughters so dying, which should be living at her decease, in equal proportions, &c.; the shares to be transferred to them at twenty-one, and the interest, in the mean time, for their maintenance; but in case either of his granddaughters should die without leaving issue, or that such issue should all die before their shares should become transferable respectively as aforesaid, then the £5000 so intended for the children of such granddaughters so dying without issue, or failing issue as aforesaid, and the dividends thereof should go and be paid, and transferred, &c., in manner following, viz., the yearly dividends to such surviving granddaughter for her own use for life, and the principal to go, survive and accrue, and be transferred to the child or children of any of such surviving granddaughters, in the same manner, &c., and subject to such power of distribution as were thereinbefore mentioned, concerning his or their original share of the £10,000 New South Sea Annuities intended for him, her, or them, after the decease of his, her, or their parents. And in case of the death of both his said granddaughters, without leaving issue of their or her bodies, or the death of such issue before their share should become payable, that then the trustees should transfer the said £10,000 unto, and equally between two of his testator's grandsons, therein named.

A., one of the granddaughters, married, and died in her sister's lifetime, leaving issue; then B., the other granddaughter, died unmarried.

The bill was filed on behalf of the infant children of A.

THE LORD CHANCELLOR held, on the clear manifest intention, that the whole fund went to the issue of A., the married daughter, although she did not survive her sister;

FERGUSON *v.* DUNBAR.

CHANCERY. 1781.

[*Reported* 3 *B. C. C.* 469 *n.*]

WILLIAM DUNBAR devised to plaintiff, his executor, so much of his personal estate as would purchase an annual sum of £550, which he gave to his wife for her life; and he directed the principal, after her decease, to be paid to his children; that is to say, one half to his son George, and the other half to his daughters, Elizabeth and Charlotte, equally, if living at the death of their mother; and if any of them should die in the lifetime of the mother, leaving issue, he gave that share to the issue of such child or children equally, at the age of twenty-one years, or day of marriage; but if any of them should die before the age of twenty-one years, without issue, he gave that share to the survivors; and if all of them should die without leaving children, then he directed the same to fall into the residue of his personal estate. He gave his daughters £8000 each, and appointed his son residuary legatee. Charlotte married Richard Mitchell; afterwards the mother died; and Charlotte died, leaving two daughters by Richard Mitchell, who were defendants to the bill, which was brought by the executor to have the trusts of the will carried into execution, and to be discharged on account of his great age. After the death of Charlotte, Elizabeth died under age, and without issue. The question was, whether the children of Charlotte were entitled to any part of the share of Elizabeth.

and declared that the plaintiffs, the infants, were entitled to the two sums of £5000 and £5000, New South Sea Annuities, subject to the contingencies in the will of the testator concerning the same. — BELT.

See, *accord.*, *Badger* v. *Gregory*, L. R. 8 Eq. 78 (1869); *Waite* v. *Littlewood*, L. R. 8 Ch. 70 (1872); *Wake* v. *Varah*, 2 Ch. Div. 348 (1876).

"I do not entirely assent to language which is to be found pervading almost all the cases upon questions of this kind, that the question is whether the word 'survivor' is to be read 'other.' I think there is certainly a very strong probability that any one using the word 'survivor' does not precisely mean 'other' by it, but has in his mind some idea of survivorship; and if the question is simply whether you are to turn it into 'other,' and say it is used merely by mistake for the word 'other,' which is the true word to express the testator's meaning, there is undoubtedly a strong *onus probandi* cast upon any one who would do that violence to the literal meaning of the word. It would be a strange thing to hold that so many testators were in the habit of using the word 'survivor' when they simply meant 'other.' Generally speaking, a reason of some kind will be found for the use of the word 'survivor' where it occurs, though it may very possibly be, and often in these cases is, an imperfect expression, not expressing completely and exhaustively the whole intention. If no such explanation can be suggested, it is a strong argument against any construction that would reject the word in its proper and primary meaning altogether, and substitute a word which has a different meaning." — *Per* SELBORNE, L. C., in *Waite* v. *Littlewood*, L. R. 8 Ch. 70, 73 (1872).

See *Lucena* v. *Lucena*, 7 Ch. Div. 255, 260, 261, 269.

Lord Chancellor said, this was one of those cases in which he had the mortification to see, that what was most probably the testator's intention could not be executed for want of his having been properly advised, and having sufficiently explained himself; that he thought the testator meant the children should take the share which would have accrued to the parent if living; but not having said so, but limited such share to the survivors or survivor, he must declare George, as the only surviving child, entitled to the whole of Elizabeth's share; and decreed accordingly.[1]

DOE d. WATTS *v.* WAINEWRIGHT.

King's Bench. 1793.

[*Reported* 5 *T. R.* 427.]

On the trial of this ejectment for a sixth part of the manor of Grafton, and other lands, in Oxfordshire, a special case was reserved for the opinion of this court.

By indentures of lease and release bearing date the 30th and 31st of July, 1718, the release being of three parts, and made between Mary Marner, widow, and Richard Abell and Elizabeth his wife, of the first part; Mary Abell and Robert Abell, son and daughter of Richard and Elizabeth Abell, of the second part; and W. Billers and E. Edwards, of the third part; Mary Marner and Richard Abell, in consideration of love and affection granted and released unto Billers and Edwards, and to their heirs, the manor or lordship of Grafton, and divers lands, &c. (in the release particularly described), in the county of Oxford, to hold unto Billers and Edwards and their heirs, to the following uses, viz., as to one moiety to the use of Mary Marner for life, and as to the other moiety, as also to the moiety limited to Mary Marner for her life; from and after her decease to the use of Richard Abell and Elizabeth his wife, for their lives, and the life of the longest liver of them; and from and after the decease of the survivor of them to the use of Mary Abell for her life; and from and after her decease to the use of such child or children as Mary Abell should thereafter have, as tenants in common (if more than one), and the heirs of their several bodies issuing: "And in case any such child or children should die without issue of his, her, or their body or bodies issuing, then the part or parts of him, her, or them so dying without issue, should be and remain *to the use of the surviving child or children* of the said Mary Abell, and the heirs of his, her, or their respective bodies issuing, and so *toties quoties* as any of the said children should die without issue till there should be only one child left; and in case *all* the said children should die without issue, or if the said

[1] See *Hayes's Trusts*, 9 Jur. N. S. 1068 (1863).

Mary Abell should have no issue of her body, then to the said Robert Abell, his heirs and assigns forever." Mary Abell married John Wainewright; and they are both long since dead, leaving issue three children, namely, John, Mary, and Robert Wainewright. Mary, the daughter, married Reader Watts, and, having survived him, died several years ago, leaving issue John Watts, the lessor of the plaintiff, her eldest son, and two other children. John Wainewright, the son, died on the 20th of June, 1792, unmarried, and without issue, and without having levied a fine or suffered a recovery of his part of the said manor, &c., leaving his brother (the defendant) Robert Wainewright and the lessor of the plaintiff, his deceased sister's eldest son, surviving him.

Williams, for the lessor of the plaintiff.

Wainewright, contra.

Lord Kenyon, C. J. This case does not involve any question respecting the raising of limitations by implication, because the deed, on which the question arises, contains express limitations by way of cross remainders, not indeed in the formal language used by conveyancers, but in terms sufficiently denoting that it was the intention of the parties to the deed that there should be cross remainders as to some of the children. Therefore all the cases, which were cited by the defendant's counsel to show that cross remainders in a deed cannot be raised by implication, may fairly be laid out of the case; because this case, when considered, does not resolve itself into any question of that kind. No technical precise form of words is necessary to create cross remainders; it is sufficient to say that there shall be cross remainders, though in the verboseness of conveyancers an abundance of words is generally introduced in deeds for this purpose. Here the single question arises on the meaning of the word "surviving," which, indeed, is the only word that distresses the case. But, taking the whole context together, I do not think that that word renders the case doubtful. The fair construction of that word, standing in this context, is that on the death of one child without issue that portion shall go to the surviving line of heirs, and not merely to one child surviving; it must go to the surviving children in their own persons, if living, or if dead, to their issues. And in putting this construction I do not think we proceed on conjecture merely; for the conclusion of this sentence is, "And in case *all* the said children should die without issue," then the remainder is limited to R. Abell in fee. We cannot give effect to the word "all," without determining that there must be cross remainders, not only as long as the individual children, but as long as the several lines of those children, exist. Therefore the share of J. Wainewright, which went over on his death without issue, went to the only surviving child and the heirs of the body of the other child, who was at that time dead, having left issue, as tenants in common. The whole context requires this construction, and the last clause cannot be satisfied with any other.

Ashhurst, J. I entirely agree with my Lord that, according to the construction of this deed, the portion of the child dying without issue

was to go over, not merely to the surviving children, but to the surviving children and to the surviving heirs of the children who were dead. This manifestly appears to have been the intention of the parties from the last sentence; for the ultimate limitation is only to take effect on the death of *all* the children without issue.

Buller, J., and Grose, J., declared themselves of the same opinion.

Postea to the plaintiff.[1]

MILSOM *v.* AWDRY.

Chancery. 1800.

[*Reported* 5 *Ves.* 465.]

Isaac Moody by his will, dated the 9th of June, 1787, after giving a legacy of £200 to his wife, gave to Awdry and Humphreys all the residue of his money and securities for money, goods, chattels, rights, credits, estate, and effects, which he was anywise entitled to, whether in possession or expectancy, in trust to pay and apply the same in manner following: namely, that they should in the first place pay thereout all his just debts and funeral expenses; and afterwards that they should place and continue the same out at interest upon government or real securities, and the interest and increase thereof should pay and apply to and among his (testator's) nephews and nieces, sons and daughters of his late brothers and sister, Matthew, David, and Hannah, equally between them, share and share alike, for their lives: the children of such of them, his said brothers and sister, to have only their father's or mother's share between them; and from and after the death of either of his said nephews and nieces in trust to call in the share of the principal money, out of which the said interest was to be paid, and pay it equally unto and among the children of such of his said nephews and nieces as should happen to die; and if any of his said nephews and nieces should die without leaving any child or children, then the share or shares of him, her, or them, so dying, should go to and among the survivors or survivor of them in manner aforesaid.

The testator died soon after the execution of his will. The bill was filed by the assignees under a commission of bankruptcy issued against a person, who in 1792 purchased all the interest of Samuel Ovens under the will. A decree was made directing the accounts; and an inquiry, what nephews and nieces of the testator were living at his death; whether any and which are dead; and whether they left any and what issue.

The master's report stated the nephews and nieces of the testator and their issue. The testator's sister Hannah had married —— Ovens;

[1] Cf. *Re Corbett's Trusts*, H. R. V. Johns. 591, 597 (1860); *Tufnell* v. *Borrell*, L. R. 20 Eq. 194 (1875).

and had issue Jacob, who died first without issue; John, who died next, leaving issue Jane Short; Samuel Ovens, living unmarried; and Hannah Coe, dead without issue.

The cause coming on for further directions, the question was, whether the plaintiffs were entitled to the absolute interest in the shares accruing to Samuel Ovens by survivorship, or to an interest for his life only in those shares.

Mr. Lloyd and *Mr. Romilly*, for the plaintiffs.

Mr. Pigott, *Mr. Martin*, and *Mr. Horne*, for the defendants.

July 7. MASTER OF THE ROLLS. [SIR RICHARD PEPPER ARDEN.] This is the case of a residue; therefore every intendment is to be made, that the testator meant to dispose out and out. I think the case so very doubtful, that I must consider farther. I have changed my opinion more than once.

July 9. This is one of the most difficult questions, that can occur: the construction of words, to which it is hardly possible to give any construction, which will not involve something like absurdity; and it is impossible to put any construction upon them, which will not under certain circumstances be contrary to the testator's intention.

The question upon this will is raised with respect to the interest of the children of the testator's sister, who had four children. The first, that died, was Jacob, who died without issue. The question then is, in what manner his fourth was to go to the three survivors; for John, who is since dead, did not die till afterwards. The question is, whether upon the death of Jacob the accruing share went to the three survivors for their lives only, or absolutely. Since that John Ovens has died; and he left issue: so that upon his own share there can be no doubt. Afterwards Hannah Coe died without issue; and Samuel Ovens is now the only survivor; in whose right the plaintiffs insist, that upon the death of any one of the nephews or nieces the share of that one survived to the others, not for their lives only, but absolutely. On the other hand it is contended, that upon the death of any one that share went to the survivors in the same manner as the original shares did; namely, for their lives only; and I suppose it is admitted, that the share of each, both original and accruing, should likewise go to the issue, if any. It must have that effect. The only question in this cause then is, how the words "in manner aforesaid" are to be applied. I am bound to give those words the same construction. The true rule is to give every word a construction, if I can, without violating clear words in other parts of the will or the general intention. If the will, after the disposition, in case any of the nephews or nieces should die without leaving issue, to the survivors or survivor, had stopped there, it would have clearly passed the absolute interest: but I must see, whether I can refer the subsequent words to any preceding part of the will. If those words mean only, that it is to be divided equally between them, they have no effect whatsoever. I cannot help saying, though it is but a conjecture, that the testator meant them to take that surviving share under the

same terms, and subject to the same restrictions and limitations as the original share. That is the fairest construction; and that which I ought to put upon this will. I cannot say, I have not had doubts upon it; nor, that my opinion has not varied.

The next consideration is, whether this violates the general intention, as manifested in this will; for that is the true way, in which we ought to construe such a will. See the effect of this. If I was to say, what the testator meant, there can be no doubt, that if there were any children, they would have the whole fund after the death of the tenants for life; and I have endeavored to give this will that effect: but I cannot go so far as to give the words "survivors or survivor" so large a construction. I think, there have been cases, in which those words have had a larger sense imputed to them than the words import; as upon a gift to children, when they attain the age of twenty-one or marry; and if any die before the age of twenty-one or marriage without leaving issue, then to the survivors or survivor: one attains the age of twenty-one, and dies; then another dies under twenty-one and unmarried; and the words "survivors or survivor" have been considered the same as "others or other;" so that such as attain twenty-one should have vested interests. But in this case, when the testator speaks thus, I am obliged to give it to the survivors or survivor. The conclusion is, they shall take it as nearly as possible as the original shares; namely, for their lives; and after the death of any of those survivors as well the original as the accruing share would go to the child of that survivor. They are now reduced to one. If he dies, without leaving a child, there must be an intestacy upon this construction; and yet there is issue of a deceased brother living. I wish extremely, that I could construe the words "survivors or survivor" to mean "others or other;" so as to make them tenants in common with cross remainders. In the case of estates tail I could have made that construction, to let in the issue of John; which would have been the most beneficial construction; and probably was the intention. I think there is such a determination. But giving this absolutely would not solve the difficulty.

Declare, that upon the death of Jacob Ovens without issue one-third part of his fourth of a third went to John for his life; one other third to Samuel for his life; and the remaining third to Hannah for her life; and upon the death of John leaving issue his original share, together with the third share, which devolved upon him for life upon the death of his brother Jacob, belonged to Jane Short, his only child; and upon the death of Hannah Coe without issue her share, together with the third, that accrued to her upon the death of Jacob, belonged to Samuel Ovens for his life; and in case he shall die, leaving issue, that issue will be entitled, as well to his original share, as to the shares that survived to him; and in case of his death without issue they will belong to the next of kin of the testator as undisposed of.

July 11*th*. A few days afterwards the cause was mentioned again as

to the costs; and the costs of Samuel Ovens were directed to be paid by the plaintiffs; and the costs of the other party to be paid out of the fund in court.

Master of the Rolls. [Sir Richard Pepper Arden.] I am very much inclined to give a larger interpretation to the words "survivors and survivor;" as Lord Thurlow was in *Ferguson* v. *Dunbar*, 3 Bro. C. C. 469 *n.*, and to hold, that if there should be children of any, there would not be an intestacy: but I can go no farther; and am sorry for it. I cannot find the decree in *Ferguson* v. *Dunbar* in the Register's book. There is only an adjournment of the cause; and the decree does not appear to have been entered.[1]

WILMOT *v.* WILMOT.

Chancery. 1802.

[*Reported* 8 *Ves.* 10.]

Matthew Wilmot by his will, bearing date the 1st of January, 1786, after giving several pecuniary legacies, gave and bequeathed to his son Andrew Wilmot one third part of whatever he might die possessed of, after all his just debts and legacies paid: such third part to be put out at interest either in the Government Funds, or any other secure manner his executors should find to be most advantageous to the interest of his said son; and it was his farther will, that his said son should not be put in possession of such third part, till he arrived at the age of twenty-five years; and he gave and bequeathed to each of his daughters Mary Wilmot and Sarah Wilmot one third part of whatever he might die possessed of, after all his just debts and legacies paid, in the following manner: to be put at interest, as aforesaid; and his will was, that his said daughter should not be put into possession of such third part, till she should arrive at the age of twenty-one years; and he did in the most earnest manner recommend her to the tender care of his executors; that she should be educated in a decent manner, suitable to the small fortune she might become possessed of at the time of her marriage: but it was his will, and he begged the particular attention of his executors thereto, that his said daughter did not enter into the marriage state before she attained the age of twenty-one years; and that such fortune as might be coming to her at that time might be settled upon her and her heirs forever; but in case of her death without issue, it was to devolve to her husband; and in case of the

[1] See *Hodge* v. *Foot*, 34 Beav. 349 (1865); *In re Beck's Trusts*, 37 L. J. Ch. N. S. 233 (1867).

Contra, *In re Arnold's Trusts*, L. R. 10 Eq. 252 (1870); *In re Walker's Estate*, 12 Ch. D. 205 (1879); *In re Bowman*, 41 Ch. Div. 525 (1889), p. *post*. See *Beckwith* v. *Beckwith*, p. 245 *post*.

death of either of the above-named children, before they attain the age mentioned to be the time, they should be put in possession of what he had therein above bequeathed to them, it was his will, that the said third part of what he might die possessed of, and which would have been coming to the deceased child, might be equally divided between the two surviving children, and in the event of the death of two of his above mentioned children, before they attain the respective ages above mentioned, then it was his will, that the whole of what he might die possessed of is to devolve to the surviving child: but should all his children die, before they should attain their said respective ages, then the whole of his estate is to devolve to the testator's brothers Andrew and Philip Wilmot and their heirs, share and share alike.

The testator died; leaving the three children mentioned in the will; upon whose bill the usual decree was made for taking the accounts, &c. Andrew Wilmot died in 1802; having only attained the age of eighteen. Mary Wilmot attained the age of twenty-one in 1795; and received her share; and having married her cousin, Matthew Wilmot, died in May, 1796; and her husband took out administration.

Sarah Wilmot married Peter M'Donald; and they, having obtained an order for a transfer and payment of her share and of a moiety of the share of Andrew Wilmot, presented another petition, that the remaining moiety might be transferred and paid to Peter M'Donald, with the consent of Sarah M'Donald, as the only surviving child.

Mr. Stanley, in support of the petition.

Mr. Hart, for Matthew Wilmot, administrator of his deceased wife.

The Lord Chancellor. [Lord Eldon.] It must be argued, that the word "surviving" means the same as "other" or "living at the age aforesaid." In the clause, in which the gift over is made, it was never meant, that any portion should be taken. It was to be the whole or none. There is a number of authorities for construing the word "surviving" to mean "other." I think, they are right in contending, that this vested.

The order was accordingly made for a transfer to the petitioner M'Donald and the administrator of the deceased daughter.

CROWDER *v.* STONE.

Chancery. 1828, 1829.

[*Reported* 3 *Russ.* 217.]

John Lloyd by his will, dated the 27th of April 1787, after mentioning in a preceding clause a nephew, John Lloyd, and four nieces, Mary Powell, Jane Greenwood, Ruth Matthews, and Catherine Mitchener, gave a sum of £1100 Four per cent Bank Annuities, and

£700 Three per cent Bank Annuities, to his executors upon trust, to pay the dividends to his wife during her life, and after her decease, to his brother during his life. The subsequent disposition of these two sums of stock was contained in the following words: — "And from and after the decease of my said wife Catherine, and my said brother Edward Lloyd and the survivor of them, my will is, that the said sums of £1100 and £700 shall be sold by my said trustees or the survivor of them, or the executors or administrators of such survivor; and the produce or money arising therefrom, shall be paid to and equally divided between my said nephew and nieces hereinbefore mentioned, share and share alike; and my mind and will further is, that, in case of the death of my said nephew, or of any or either of my said nieces, without lawful issue, before their respective parts or shares of the said sums of £1100 and £700 shall become due and payable to them under and by virtue of this my will, then the part or share of him, her, or them, so dying without issue as aforesaid, shall go to and be equally divided between and amongst the survivor and survivors of them, share and share alike."

The testator died shortly after the date of his will. His wife survived his brother, and died in 1823: at which time, out of the five legatees — the nephew and the four nieces — Ruth Matthews alone was alive. Mary Powell died in July 1797, leaving an infant son, who died without issue in 1799. Catherine Mitchener died in August 1797, and John Lloyd the nephew, in 1805, both of them leaving children who were still alive. Jane Greenwood died in 1802, without issue.

Mr. Russell, for the plaintiff, who was the personal representative of the testator.

Mr. Horne and *Mr. Evans*, for the personal representative of Catherine Mitchener.

Mr. Pepys and *Mr. Tinney*, for the executors of Ruth Matthews, who died after the institution of the suit.

Mr. Koe, for the executors of the nephew, John Lloyd.

Mr. Bickersteth, for the personal representative of Mary Powell.

Mr. Loyd, for the personal representative of Jane Greenwood.

August 19, 1828. The Lord Chancellor. [Lord Lyndhurst.] "Death without lawful issue" denotes generally an indefinite failure of issue. But in this case a time is limited, within which the failure of issue is to take place, and that is the time when the fund is to become divisible, and the shares are to be paid. Mrs. Powell had a son, who was living at the time of her death in 1797; but that son died without issue in 1799, during the lifetime of the testator's widow, and, consequently, before the period when the shares of the stock became due and payable. Under these circumstances, I am of opinion that Mary Powell took nothing under this will.

The next question relates to the share of Jane Greenwood. As she survived the son of Mary Powell, she would become entitled to her

proportion of Mary Powell's share; and though she died before the time when the shares became payable, and though, therefore, her original share would become divisible among the survivors, yet, on the authority of *Ex parte West*, 1 Bro. C. C. 575, and that class of cases, the share which accrued to her would not go over.

Jan. 27, 1829. There was a third point argued in this cause, on which I omitted to give judgment. It was contended that the words, "survivor and survivors of them," were to be construed "other and others." That is a construction which the court has, in some cases, put upon those or similar words; but it is what Lord Eldon, in *Davidson* v. *Dallas*, 14 Ves. 578, calls a "forced construction of the term survivor," and he contrasts it with what he calls its "natural meaning." It is a construction which the court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will; and in *Wilmot* v. *Wilmot* it was scarcely possible to put any other meaning on the words. But, in looking at the language and the provisions of this will, I do not find any such necessity; and it seems to me, that the words "survivor and survivors" are here to be taken in their natural meaning. The shares, which became subject to the operation of the bequest to the survivor and survivors, will be divisible among such only of the five legatees as were living at the time when the events happened on which the shares were to go over respectively. The representative of Mitchener is not entitled to any part of them.[1]

EYRE *v.* MARSDEN.

CHANCERY. 1839.

[*Reported* 4 *Myl. & Cr.* 231.]

JOSEPH WILDSMITH,[2] by will dated in 1804, directed the income of his estate to be accumulated, subject to the payment of certain annuities, during the lives of his children, and on the death of his last surviving child to divide the capital equally among those of his grandchildren who were living at his death. The will continued thus:

"And I do will and direct that the shares of such of my said grandchildren as shall be under the age of twenty-one years, at the time of the decease of the survivor or longest liver of my said children, shall be placed out or continue upon security; and the interest thereof shall

[1] In *Lapsley* v. *Lapsley*, 9 Pa. 130 (1848), in a devise to sons, and if any of them should die without issue, their part to be divided between the surviving brothers, "surviving" was held to mean "other." *Quære tamen.*

[2] The following statement is substituted for that in the report, and part of the opinion, touching on another point, is omitted.

be applied in the maintenance of my infant grandchildren, during their respective minorities. And in case any of my said grandchildren shall die, before his, her, or their share or shares of my estate and effects shall become payable by virtue of this my will, leaving lawful issue, then such issue shall be entitled to the share or shares which his, her, or their deceased parent or parents would have been entitled to, if then living. But in case of the death of any of my said grandchildren, without leaving issue, before he, she, or they shall become entitled to receive his, her, or their share, or respective shares of my said estate and effects, in manner aforesaid, then I give and bequeath the share or shares of such deceased grandchild or grandchildren unto and equally amongst my surviving grandchildren, to be paid at the same time and in the same manner as before mentioned touching the original share or shares of my said grandchildren."

The testator left ten grandchildren; five only of whom survived his children. Of the other five, two had left issue who survived said children.

The Master of the Rolls decided that the issue of the deceased grandchildren were entitled to share. One of the living grandchildren appealed.

Mr. Treslove and *Mr. Tillotson*, in support of the appeal.

Mr. Spence, *Mr. Temple*, *Mr. Bichner*, *Mr. Anderdon*, *Mr. Wakefield*, *Mr. Wigram*, *Mr. Richards*, *Mr. Kenyon Parker*, *Mr. Rogers*, and *Mr. Willcock*, for different parties interested in supporting the decree.

The Lord Chancellor. [Lord Cottenham.] Each grandchild living at the testator's death had, for himself or his children, a vested interest in his own share, subject to be devested in the event of his dying without leaving any child before the death of the surviving annuitant: and he had also a contingent interest in the share of any other of the grandchildren who might die without issue before the death of the surviving annuitant. And the question is, whether this contingent interest was to depend upon the further contingency of himself surviving such other grandchildren; that is, whether the fact of his predeceasing such other grandchildren was intended to deprive his children of that benefit to which he would himself have been entitled had he survived; or, in other words, whether his children who, in the event of his death before the death of the surviving annuitant, were to stand in his place, were to do so as to his original share only, and not as to the accruing share.

I am of opinion that the children are to stand in the place of the parent as to both the original and accruing shares. The direction is, that in case any of his grandchildren "shall die before his, her, or their share or shares of his estate and effects shall become payable, leaving lawful issue, then such issue shall be entitled to the share or shares which his, her, or their deceased parent or parents would have been entitled to if then living." This description is amply sufficient to include the shares in question. These accruing shares are given

"unto and equally amongst my surviving grandchildren, to be paid at the same time, and in the same manner, as before mentioned touching the original share or shares of my said grandchilren."

If it were necessary to consider the word "surviving" as meaning "living at the time of the accruer taking place," there would be much difficulty in the construction contended for by the respondents. But it is not necessary to give it that meaning. The word "surviving" has been construed "other," to give effect to the apparent intention. Lord Eldon so lays down the rule in *Wilmot* v. *Wilmot*, 8 Ves. 10. If "surviving" were to be construed "living at the time when the accruer takes place," the grandchildren then living would take absolute interests, unless the words "in the same manner as before mentioned touching the original shares" introduce into this gift the provision for the children, and the gift over upon death without children; and if it do so, why is it not also to introduce into this gift the provision for children in the event of the parent's death before the happening of the accruer? If this construction be not adopted, upon the death of all the grandchildren but one, during the life of the surviving annuitant, the share of that one, afterwards dying in the lifetime of the annuitant, would be undisposed of, although all the other grandchildren might have left children.

I think the intention sufficiently expressed, and there is ample authority for construing the words so as to give effect to such intention. I therefore think the judgment of the Master of the Rolls right upon this point.

LEE *v.* STONE.

EXCHEQUER. 1848.

[*Reported* 1 *Ex.* 674.]

POLLOCK, C. B.[1] The question in this case is, whether the words "survivor or survivors," occurring in the will of John Cook, are to be construed according to their natural import, or as meaning "other or others."

The testator had three daughters, Mary Ann, the wife of Henry Stone, Charlotte, the wife of John Angell, and Lucy, afterwards the wife of John Atkins, but who at the date of the will was unmarried.

By the will in question, the testator gave a real estate to his daughter Mary Ann for her life, with remainder to her children as tenants in common in fee; and he gave another real estate to each of his two other daughters, Charlotte and Lucy, for their respective lives, with like remainders to their respective children in fee. Then follows this proviso: "Provided always, and it is my will, that if any or

[1] The opinion only is here given, and a part of that relating to another point is omitted.

either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then and in that case the property hereinbefore given to such daughter so dying, shall go and accrue to the *survivors or survivor* of my said daughters, their or her heirs, executors, administrators, and assigns, in equal shares and proportions, as tenants in common, and not as joint tenants. And if all my daughters, except one, should depart this life without having lawful issue, then I direct that the shares of such daughters, so dying, shall go to the *survivor* of my said daughters, her heirs, executors, administrators, and assigns, forever."

The testator died in January, 1841. On the 3d of October following, Charlotte Angell died intestate, leaving a son, John Cook Angell, her only child and heir. And on the 25th of the same month of October, 1841, Lucy Atkins died, an infant, never having had any child.

The case states, that, on the 22d of December, 1841, Stone and his wife conveyed to John Dumbell and his heirs, as well the property devised to Mary Ann Stone for life, as also that devised to Lucy Atkins for life, to hold the same to Dumbell and his heirs, to the use of Mary Ann Stone for the joint lives of herself and her husband, with remainder to the survivor of them in fee.

The question is, whether, on the death of Lucy, Mary Ann Stone, as the then sole surviving daughter of the testator, took the whole of the estate originally devised to Lucy, or whether John Cook Angell, as heir-at-law of Charlotte his mother, took one moiety of it. And this depends upon the construction to be put upon the word "survivor" as occurring in the proviso: if it is to be construed according to its natural meaning, certainly Mary Ann is entitled to the whole, for she alone survived Lucy; if it means "other," then John Cook Angell, as heir-at-law of his mother Charlotte, is entitled to one moiety.

We are of opinion, that in this case there is nothing to justify us in giving to the word "survivor" any other than its natural meaning. Even admitting that there are cases in which the courts have taken upon themselves to say that by the words "survivors or survivor" the testator must have meant "others or other," though there has been nothing to warrant such a construction beyond the strong probability that the testator may so have intended, yet it is also certain that the almost uniform current of authority on this subject for above half a century has run in an opposite direction; and this on very sound and reasonable principles. It may be, that by a rigid adherence to the ordinary meaning of the testator's words, the courts may sometimes disappoint the intention which he really had, and which, by the words in question, he meant to express; but this is a misfortune against which it is impossible to guard; it arises, not from any defect of the law, but from the neglect of the testator in not using language calculated to express his real meaning. The law admits of no will

except a will reduced into writing, and signed by the testator; and we are violating the law whenever we receive, as a testator's will, not what he has written, but what we conjecture he meant to have written. Of course, this observation does not apply to a case, where, on the face of the will, it appears that any word of known import is used in some *other than* its definite sense, differing from its ordinary sense. We are bound, then, to give such word the sense in which it has been used, in the same way as if the testator had in terms said he intended so to use it. It is impossible to lay down any general rule beforehand, defining what will in each case be sufficient to enable a court to say, from matter apparent on the face of the will, that the testator is using any word not according to its ordinary meaning. It is sufficient for us to say, that there must be something beyond the mere probability, however strong, that the testator was not aware of the precise effect of the language he has used. In this case there is nothing to show to us that the word "survivor" was used in any other than its ordinary sense, and therefore we must give to it its ordinary meaning, and hold that the property given to Lucy for her life, on her death, vested absolutely in Mary Ann in fee.

On the same principle precisely, we must hold, that under no possible contingency can John Cook Angell become entitled to any interest in the property given to Mary Ann Stone for her life.

On these principles we shall certify our opinion to Vice-Chancellor Knight Bruce.[1]

Rose, for Mary Ann Stone and Henry Stone.
Winser, for John Cook Angell.

[1] See, *accord.*, *Re Corbett's Trusts*, H. R. V. Johns. 591 (1860), and *Twiss* v. *Herbert*, 28 L. T. N. S. 489 (1873), though in this last case there was a final gift over.

"As I understand the rule of reading 'survivor,' 'other,' or rather of inferring or assuming that the testator wrote 'survivor,' when he meant 'other,' it is this, that where there is a gift to several persons for life with remainders to their children or other issue with cross-remainders between the stocks, and you find that there is a gift over in case of one of the tenants for life dying without children or the other class of issue to their survivors and their children or issue, there you read 'survivor' as 'other,' or suppose it was put for 'other,' because, if not, you would have the absurd result of the testator's intending to benefit a class of tenants for life and their children or issue by stocks, and going on to deprive one or more of the stocks of their shares, because their parent who takes for life only is dead, and who, being dead, could in no event take any more. It is only reasonable, therefore, to presume that what the testator intended was to express cross-remainders between the stocks, that is, that each share should go over to the other tenant for life's children or issue in exactly the same way as the original shares, and for that reason to presume that he intended to write 'other' when he wrote 'survivor.' Where on the other hand the gift to the survivors is not a gift to a survivor for a limited interest, with remainder to his children or issue in the shape of stocks, there is no reason for such an implication. The person takes absolutely, and the person to take absolutely would naturally take absolutely if he survived. The testator would naturally prefer to give an absolute interest to a living person, rather than to a dead person or the representatives of a dead person, and therefore there is not only no reason for changing the meaning of

BECKWITH *v.* BECKWITH.

COURT OF APPEAL IN CHANCERY. 1876.

[*Reported* 46 *L. J. Ch. N. S.* 97.]

WILLIAM BECKWITH, by his will, dated the 21st of September, 1865, after certain specific and pecuniary bequests, devised all his real and personal estate to trustees upon trust for sale and conversion, and upon trust after payment of his funeral and testamentary expenses, to pay and divide the residue of the moneys so arising among all such of his five daughters, Mary Jane, Georgina Frances, Harriet Ellen, Caroline Phillis, and Alice Gertrude, as should be living at his death in equal shares; and the testator declared that the trustees should invest every share given to a daughter of his living at his death, and should, during the life of each such daughter, pay the interest, dividends, and income of her share to such daughter for her separate use without power of anticipation, and after the death of each such daughter should stand possessed of her share in trust for her children or child as she should appoint, and in default of appointment, to all equally — sons at twenty-one, and daughters at twenty-one or marriage; and if there should be no child of such his daughter who, being a son, should attain the age of twenty-one years, or being a daughter should attain that age or marry, he declared that after the death of such daughter, and such default or failure of children, the trustees should stand possessed of any sum not exceeding £2,000 in value, part of the share of such daughter, in trust as she should appoint, and in default of and subject to appointment, as well the original share of such daughter as any share or shares which might accrue to her under that provision, or any other clause or provision of accruer in his will, should accrue to his other daughters or other daughter surviving, in equal shares if more than one, and the share or shares which should so accrue should be held upon the trusts, and with the powers, &c., therein contained, concerning her original share, or as near thereto as circumstances would permit.

The testator died on the 26th of November, 1865, and his will was proved on the 10th February, 1866. The suit of *Beckwith* v. *Beckwith* was instituted for the administration of his estate, and a decree made on the 6th of May, 1870.

All the five daughters of the testator named in his will survived him.

Harriet married the defendant, F. A. Browne Cave, on the 5th of January, 1869, and died on the 10th of May, 1873, leaving one infant child.

the word, or assuming that the word was written by mistake for 'other,' but there is every reason for keeping it to its strict meaning, as you then benefit somebody who is alive." — *Per* JESSEL, M. R., in *Maden* v. *Taylor*, 45 L. J. Ch. N. S. 569, 574 (1876).

Contra, *Ailon* v. *Brooks*, 7 Sim. 204 (1834); see 2 Jarm. Wills (4th ed.), 694, 695.

Alice married Captain Annand, R. H. A., on the 20th of January, 1870, and had two children.

Mary married Colonel Longcroft on the 13th of April, 1871.

Caroline died on the 6th of April, 1875, a spinster, having survived her sister Harriet, but leaving her other three sisters surviving.

The three surviving sisters presented a petition praying for a declaration that upon the death of Caroline her share (subject to the payment of £2,000, which she had appointed by will) accrued to her sisters who survived her, in equal shares, with consequential relief.

The petition came on to be heard before *Vice-Chancellor Hall* on the 21st of July, 1876, when his Lordship, being of opinion that each of the three petitioners was entitled for life to the income of one-fourth only of Caroline's share, and that the infant child of Harriet was entitled to the remaining fourth, contingently on his attaining twenty-one, made an order in accordance with this view.

Mrs. Annand and Georgina Beckwith appealed from this order. Mrs. Longcroft had died after it was made.

Mr. W. Pearson and *Mr. Jason Smith*, for the appellants.

Mr. Dickinson and *Mr. Whitehorne*, for the respondent.

JAMES, L. J. I am afraid that our decision in this case will only add one other to the bead-roll of cases, and lengthen it by and by, which have always been cited, and will always be cited, whenever the question as to what the words "survivor and survivors" mean. We might hope that some day or other it will be reduced to something like a rule to enable families to know what the meaning of the words of a testator's will is.

In this particular case the Vice-Chancellor was of opinion, and of course it has been strenuously insisted upon before us, that the word "surviving" must mean "surviving the testator." As I understand the argument which has been addressed to us, we must so construe it, because we should be thereby giving effect to what is supposed to be the probable intention of the testator. But we must construe it according to its plain natural meaning.

Now, on reading the will independently of any of the legal results arising from it, I cannot bring myself to doubt that the meaning of the word surviving is "then surviving." The testator has begun with a class of children living at his death, and then having got that class, he says: If one of the daughters shall die — that is, if one of the daughters living at my death shall die — then I give it to the other or others of my daughter or daughters who shall be surviving. It seems to me impossible to doubt that the word "surviving" there means "then surviving." If that is so, that part of the case must be decided in favor of the appellants.

Then it is said, even assuming that to be so, and assuming that you read the words as other daughter or daughters then surviving, or read them as "survivor or survivors," the cases authorize us to read the words "survivor or survivors" as "other or others."

Now there was apparently at one time what certainly appeared to be a misapprehension, which seemed to be assumed in gifts to families, that the word "survivors" did mean others, and that we ought to hold, without anything more, that whenever there is a gift to daughters and their families, and a gift over to the survivors, the word "survivors" *ex vi termini* must mean "others."

We had occasion to consider this very fully in the case of *Wake* v. *Varah*, 2 Ch. Div. 348, which followed the cases of *Waite* v. *Littlewood*, L. R. 8 Ch. 70, and *Badger* v. *Gregory*, L. R. 8 Eq. 78; and there Lord Justice Baggallay, in going through the cases, found the clew which was to be considered to be the *ratio decidendi* which was supplied by the cases of *Waite* v. *Littlewood* and *Badger* v. *Gregory*. In that case the words were: "And in case all my said children shall die without leaving issue as aforesaid, then in trust for the heirs, executors, administrators, and assigns of the survivor." From this it is evident not only that the testator intended to provide, and considered that he had provided in the previous portion of his will for all possible events in which any of his children might have been placed, but also that it was his intention, if there was any such issue, whether of one child or more, that that issue should become entitled to his property.

In the case of *Badger* v. *Gregory*, which was before myself, I endeavored to explain it. There the gift over showed an intention that the property was not to go over unless all the issue failed, and that there was a reasonably plain intention that the issue should take upon the failure of whom only the gift over was to take effect. That appeared to afford a sufficient indication of the intention of the testator to create what are called cross limitations among the children. But in the absence of any such ground for raising the implication, I am of opinion that we must leave the words to bear their ordinary natural and grammatical interpretation.

Baggallay, J. A. There is not, in my opinion, sufficient reason to justify the court in attributing to the word "surviving," as used by the testator, any other than its natural and ordinary meaning. If the testator, when making his will, had contemplated the happening of the events which have actually occurred, I cannot, upon a careful consideration of all the words of this will, come to any other conclusion than that he intended that the words should be read in their ordinary and natural meaning. I can see nothing capricious or unreasonable in a testator who has made a disposition in favor of all his daughters, their families taking in equal shares, making a further provision that in the event of any of his daughters dying without leaving issue, the share to which her issue, if there had been any, would have succeeded, should go to or amongst the survivor or survivors, to the exclusion of the children of a deceased sister. I think there is nothing unreasonable in such a provision, and that would be giving the ordinary and natural meaning to the words he has used; and indeed the idea of an unequal

distribution of the property is not altogether opposed to the scope of the testator's will, for in dealing with the household furniture, plate, books, and pictures, he has given an ultimate benefit to the one who should last marry, or should remain the longest unmarried. It is possible (although I see no reason to suppose that such would be the case) that the testator did not contemplate the happening of the events that have occurred, and that if he had contemplated them, he would have made some other provision. But this is merely matter of conjecture, and we cannot, in construing a will of this kind, give effect to such a mere conjecture.

A variety of authorities have been cited, but I confess that none of them appear to me to govern the present case. The cases which have been mainly relied upon on the part of the respondents differ very materially from what we have before us. There is not in the present case a gift over in default of issue of all the daughters or children as there was in *Waite* v. *Littlewood*, *Badger* v. *Gregory*, and *Wake* v. *Varah*, nor is there that which, so far as I read the authority of Lord Selborne, is to be found in *Waite* v. *Littlewood*. Lord Selborne, in *Waite* v. *Littlewood*, mainly relied upon the general intention of the part of the testator to keep the property in the family. He seems to have meant that wherever there was a failure of a particular *stirps* the share of that *stirps* should accrue to the other *stirps* and go in the same manner as the original shares.

Upon consideration of all the terms of this will it appears to me that we must give to the words used their ordinary and natural meaning, and it does not appear to me that giving them their ordinary and natural meaning, any unreasonable or capricious intention will be attributed to the testator.

Bramwell, J. A. I am of the same opinion. I do not presume to express any opinion upon the authorities; but for them I should say that the case was not arguable.[1]

[1] Followed by Hall, V. C., in *In re Horner's Estate*, 19 Ch. D. 186 (1881), overruling, it would seem, his previous decision in *In re Walker's Estate*, 12 Ch. D. 205 (1879), and by the Court of Appeal in *In re Benn*, 29 Ch. Div. 839 (1885). In *In re Bowman*, 41 Ch. D. 525 (1889), the testatrix bequeathed her personal estate to her nephew William in trust to pay the income equally among her four nieces during their respective lives, and after the decease of any of them to pay the principal of her share to or "among her children" as she should appoint, and in default of appointment to pay the same equally amongst such children, the shares of sons to be vested interests at their respective ages of twenty-one years, and the shares of daughters at their ages of twenty-one years or days of marriage, which should first happen, with benefit of survivorship among them as to the original and accruing shares of any of them who should die before attaining a vested interest, and she gave to her nephew William powers of advancement and maintenance in favor of her nieces' children, and continued: 'And in case any of my said nieces shall die without having any children who shall have attained a vested interest, I give the share of such niece after her decease, and also the interest thereof, to my said nephew William, his executors and administrators, upon trust to pay and dispose thereof to or among her surviving sisters and their respective children, in the same manner as I have hereinbefore directed

SECTION III.

ACCRUED SHARES.

RUDGE *v.* BARKER.

CHANCERY. 1735.

[*Reported Cas. temp. Talb.* 124.]

THOMAS COLE made his will as follows, viz., "I give unto my granddaughters Elizabeth and Anne, and to my grandson Thomas £1000 of my capital stock in the East India Company, and the interest thereof to them for their use. And if any dies, to the survivors or survivor share and share alike; and my meaning is, that the interest shall be paid to their father my son Howard, to be improved to their use." The grandson died an infant, by which his share survived amongst his two sisters; then one of the sisters dies, and the question was, whether the share she had taken by survivorship upon her brother's death should survive to the other sister, as well as her original legacy of £1000? or whether that share taken by survivorship should go to the father, who was her administrator?

MASTER OF THE ROLLS. [HON. JOHN VERNEY.] The first question is, whether the interest shall receive a different construction from the principal? But I think it will not; for, being both coupled together, they must receive the same determination.

The next question is, whether the share arising by survivorship, which the deceased sister took upon her brother's death, will survive to the next sister; or, whether it will go to her father who is her ad-

respecting their original shares;' and she gave the residue of her personal estate to her nephew William, whom she appointed sole executor of her will."

MR. JUSTICE KAY held, that on the death of a niece the children of another niece who had previously deceased were entitled to share. He said: "I confess I am glad to find this consensus of authority in favor of my opinion. It seems to me that the decisions establish the following propositions: —

"Where the gift is to A., B., and C. equally for their respective lives, and after the death of any to his children, but if any die without children to the survivors for life with remainder to their children, only children of survivors can take under the gift over.

"If to similar words there is added a limitation over if all the tenants for life die without children, then the children of a predeceased tenant for life participate in the share of one who dies without children after their parent.

"They also participate, although there is no general gift over, where the limitations are to A., B., and C. equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares."

As to cases where some of the shares are settled and some not, see *Jackson* v. *Sparks*, 38 L. J. Ch. N. S. 75 (1868); *Luccna* v. *Luccna*, 7 Ch. Div. 255 (1877).

ministrator? And I am of opinion that it does not survive, but goes to her administrator. Indeed, it may be, the testator intended the whole to go amongst his grandchildren, and nobody else to have any benefit: but whatever his intent might be, I must judge upon the words of the will; and according to those, the limitation over relates to the legacy only. Had they not been distinct legatees, it might have been another question: but being entirely distinct, and not even so much as tenants in common, the case is the same as that of *Bearnes* v. *Ballard* before the Lord King, June 1, 1727, where it was decreed for the administrator. And agrees with the Lord Holt's opinion cited in *Woodward and Glassbrook's Case*, 2 Vern. 388, the devise is several, and the question is not upon the original share, but upon the share that accrued by the survivorship, which goes to the administrator by reason of the words *share and share alike*, which are tantamount to the words *equally to be divided.*

And so decreed the share accruing by survivorship to the father, who was the administrator of the deceased.[1]

WORLIDGE *v.* CHURCHILL.

CHANCERY. 1792.

[*Reported* 3 *B. C. C.* 465.]

EDWARD WORLIDGE, the plaintiff's father, seised of estates in fee-simple, and possessed of personal estate, made his will, dated 19th August, 1772, and thereby gave unto Mary Worlidge an annuity of £150, and also gave to the defendants, Churchill and others, all his real estates, and also all his personal estate, on trust to sell the same, and the moneys arising therefrom, after payment of his debts, and retaining so much as should be sufficient to purchase such annuity, to lay out the same in government security, in their names, in trust, and for the benefit of Rosalba Worlidge, plaintiff, Edward Worlidge, William Worlidge, and John Worlidge, to be equally divided amongst them, on their attaining the ages of twenty-one years; but if any of them should happen to die before attaining such age of twenty-one years, then such deceased child's share to go to the survivors or survivor of them; and he directed the said trustees to apply the interest of such trust-money, during their minority, for and towards their maintenance and education; but if the interest should be more than sufficient for such purpose, then he directed the trustees to lay out the same for the said children's mutual benefit, and in case all the said four children should happen to die before attaining the age of twenty-

[1] *Accord.*, *Ex parte West*, 1 B. C. C. 575 (1784); *Crowder* v. *Stone*, 3 Russ. 217 (1827) p. 238, *ante*; *Masden's Estate*, 4 Whart. 428 (1839). *Contra*, *Taylor* v. *Foster*, 17 Ohio St. 166 (1867).

one years, and leave Mary Worlidge living, then he directed the trustees to pay her the interest of such trust-money, from time to time as it should grow due, and after the decease of all, he gave and bequeathed the said trust-money to the children of his late uncle, Mr. Stephen [Landen], to be equally divided among them, share and share alike, with power to the trustees to put the sons apprentice, and provide apprentice-fees, and made the trustees executors.

Testator made two codicils, immaterial to the present question.

John, one of the children, died in the lifetime of the testator.

William Augustus (in the will, called William) died in February, 1783, an infant, aged about seventeen, intestate and without issue; and the defendant, Townshend, having obtained letters of administration, was his personal representative.

Rosalba died in July, 1786, an infant about eighteen, but made a will disposing of such estate and effects, of what nature, &c., as she became entitled unto, and vested in her in consequence of the decease of her late brother, John William, in the lifetime of her father, and after the decease of her late brother, William Augustus Worlidge, by virtue of the will of said Edward Worlidge, or otherwise howsoever, "and also her estate and effects whatsoever which she might be possessed of or entitled unto, and which she had right to dispose of," and made the defendant, Porter, executor of such will.

The plaintiff filed his bill against the executors, for an account, and prayed, *inter alia*, that the representatives of William Augustus, and Rosalba, might set forth their claims.

The defendant, Townshend, by his answer, submitted that he was entitled, as representative of William Augustus Worlidge, to such share as his intestate would have been entitled to.

The defendant, Porter, as executor of Rosalba, insisted that John having died in the life of the testator, one fourth part of the money arising from the sale of testator's estates, to which John would have been entitled had he survived testator and attained twenty-one years of age, upon decease of testator accrued to plaintiff, and said Rosalba and William Worlidge, and the interest therein became vested in them, immediately; and, upon the decease of said William, an infant under twenty-one, his share also in testator's estate, vested immediately in plaintiff and Rosalba, in equal proportions, and therefore claimed the same, subject to the trusts of her will.

The cause coming on to be heard (11th February, 1792) before Mr. Justice Buller, sitting for Lord Chancellor.

Mr. Solicitor-General, *Mr. Mitford*, and *Mr. Richards*, for the plaintiffs.

Mr. Selwyn and *Mr. Jones*, for the defendant, Porter, the executor of Rosalba.

Mr. Justice Buller. There are cases in which the court finds that, in its decisions, it has not followed the intent of testators, as in the case where freehold property is given to the devisee generally, without

words of limitation, the court will not vary from the legal rule; but if it is clear the testator meant to give the devisee an absolute interest, the court will raise a fee.

This is a case of the same kind; the court has thought itself bound to decide according to the rule of law, though the construction was against the intention of the testator, as it was in the case *Ex Parte West*, 1 B. C. C. 575, where the gift was of a distinct legacy.

It is impossible to express a greater dislike to a rule, than Lord Thurlow expressed in that case; and he ended with an indication to the parties to bring the case before him again. He was of the same opinion when he decided *Ferguson* v. *Dunbar* [3 B. C. C. 469, n.]; he was desirous to catch hold of the circumstance, to take the case out of the rule.

The language that has been used on these subjects, is not easy to account for; in *Rudge* v. *Barker*, it is said by the Master of Rolls, that, whatever the intention of the testator might be, the court must judge on the words of the will. That expression is not accurate; the court must go upon the words of the will, to discover the testator's intention; but, if the intention is apparent, it must be pursued.

The distinction as to their being distinct legacies is rather a nice one, but not so nice as not to be regarded; *Rudge* v. *Barker*, it is said, "had they not been distinct legatees, it might have been another question;" that shows the rule was not thought to apply to an aggregate fund.

If this were *res nova*, and there was a limitation to "survivors and survivor," no one could collect the intent to be otherwise than that the survivor should take the whole; but if the case had rested there, I should have thought it difficult to get over the objections.

But the strong part of the present case is, the testator's intention to keep it as an aggregate fund. He has made use, in two different parts of the will, of the words trust-money; that expression does not apply to the share of each child, but to the whole fund in the trustee's hands, and takes in the whole fund that is to be distributed under the will. The second place where he uses the expression trust-money, is in the gift over to the children of his uncle [Landen]; and though the expressions the whole, or all, are not used, the words trust-money are tantamount to them. The plaintiff therefore is entitled to the whole fund.

And all the parties must have their costs paid out of it.[1]

[1] See *Barker* v. *Lea*, T. & R. 413 (1823); *Douglas* v. *Andrews*, 14 Beav. 347 (1851); *Dutton* v. *Crowdy*, 33 Beav. 272 (1863).

Cf. *Milsom* v. *Awdry*, 5 Ves. 465 (1800), p. 234, *ante*; *Eyre* v. *Marsden*, 4 Myl. & Cr. 231 (1838), p. 240, *ante*.

NOTE. — On the question whether accrued shares are subject to the same qualifications as original shares, see *Gibbons* v. *Langdon*, 6 Sim. 260 (1833); *Melsom* v. *Giles*, L. R. 5 C. P. 614 (1870); L. R. 6 C. P. 532 (1871); *sub nom. Giles* v. *Melsom*, L. R. 6 H. L. 24 (1873); 2 Jarm. Wills (4th ed.) 715–718.

CHAPTER VIII.

GIFTS ON FAILURE OF ISSUE.

PELLS *v.* BROWN.

KING'S BENCH. 1620.

[*Reported Cro. Jac.* 590.]

[See this case given p. 163 *ante.*]

CHADOCK *v.* COWLEY.

KING'S BENCH. 1624.

[*Reported Cro. Jac.* 695.]

EJECTMENT of lands in Bradmere, of a lease of William Hydes. Upon not guilty pleaded, a special verdict was found, that William Hydes, the lessor's grandfather, was seised in fee of this land in Bradmere and East-Leak, holden in socage of that manor; and having two sons, Thomas and Francis, devised them by his will in this manner, viz. to his wife for life, and after her death all his lands in Bradmere to Thomas his son and his heirs forever; and his lands in East-Leak to Francis his son and his heirs forever. "Item, I will that the survivor of them shall be heir to the other, if either of them die without issue." The wife enters, and dies, Thomas enters into the lands in Bradmere, and devises them to Richard his second son in fee, under whom the defendant claims; and William the eldest son of Thomas enters, and lets it to the plaintiff. *Et si super, &c.*

The sole question was, Whether this devise be an estate tail immediate by the devise, or only a contingent estate, if he died without issue in the life of his brother?

And it was holden by all the COURT (*absente* LEA), that it was an estate tail, so the devise of Thomas was void: for although it were objected, that the words, "the survivor shall be heir to the other if he die without issue," are idle, for it doth not appear that he had any other children; and then when the one dies without issue, the other is his heir by the law, and so he wills no more than the law appoints; *sed non allocatur;* for *non constat* but that he might have other children, and that by several *venters;* and by the devise he intended to give it to the others by way of devise, if he died with-

out issue. Secondly, for the words, "that the survivor shall be heir to the other if he dies without issue," they seem to be an estate tail. But if the devise had been, that "if he died without issue in the life of the other," or "before such an age," that then it shall remain to the other; then peradventure it should be a contingent devise in tail, if it should happen, and not otherwise: but being, "that the survivor shall be heir to the other if he die without issue;" that in his intent is an absolute estate tail immediately, and the remainder limited over, as 7 Edw. 6, "*Devise*" 38, is; and resembled it to the case 9 Edw. 3, "*Tail*" 21, and 35 Ass. pl. 14, and 9 Co. 128, and 16 El. Dyer, 330. And that here, although the first part of the will gives a fee, the second part corrects it, and makes it but an estate tail. Wherefore it was adjudged for the plaintiff. *Vide* Dyer, 354 and 122, 124. And this judgment was given upon the first argument.[1]

NICHOLS *v.* HOOPER.

CHANCERY. 1712.

[*Reported* 1 *P. Wms.* 198.]

JOHN JACKSON seised in fee devised lands to his wife Mary for life, remainder to his son Thomas Jackson and his heirs; provided, that if the said Thomas Jackson should die *without issue of his body*, then he gave £100 apiece to his two nieces A. and B. to be paid within six months after the death of the survivor of the said mother and son, by the person who should inherit the premises; and in default of payment, as aforesaid, then the testator devised the lands to the legatees for payment, and died.

The testator's wife Mary died, and the son Thomas Jackson died, leaving a daughter, which daughter, within the said six months after the death of her father Thomas Jackson died also without issue; the bill was to have the £200 and for the plaintiffs.

It was urged, that though Thomas Jackson left issue living at the time of his death, yet when that issue died without issue, then did Thomas Jackson die without issue; that if a man should devise lands to A. in tail, and if A. died without issue, then to B. if A. should leave issue, and that issue should afterwards die without issue, B.'s estate would plainly commence. So if a rent were limited to commence upon tenant in tail's dying without issue, if tenant in tail left issue, that afterwards died without issue, the rent must commence; and it was said to be the stronger, in regard, in this case, here was a death

[1] See *Burrough* v. *Foster*, 6 R. I. 534 (1860), and cases cited for the plaintiff.

But see, *contra*, *Anderson* v. *Jackson*, 16 Johns. 382 (1819); and cf. *Greenwood* v. *Verdon*, 1 K. & J. 74 (1854); *Abbott* v. *Essex Co.*, 18 How. 202 (1855).

without issue within six months after the death of the survivor; (*scil.*) the issue of Thomas died without issue within six months after the death of Thomas her father.

Vernon & Cur' [LORD KEEPER HARCOURT] *cont':* Thomas Jackson is not by this will made tenant in tail, but continues tenant in fee-simple; so that this is not like the limitation of an estate; for it is agreed, that in case of limitation of estates, in construction of law, whenever there is a failure of issue of J. S. though J. S. died leaving issue at his death, yet from that time J. S. is dead without issue.

But where a legacy is given by a will, to commence upon this contingency, (*scil.*) *if J. S. shall die without issue*, this shall be taken according to common parlance, viz. issue living at his death; for, in common parlance, if J. S. leaves issue, he does not die without issue; and it cannot be intended that the testator designed, whenever there should be a failure of issue of Thomas, (which might be 100 years hence,) that then these legacies, which were meant only as *personal provisions*, should take effect.

However, in this case, with respect to the legatees, if the legacies take any effect, the words of the devise pass a legal interest, and the court does not hinder the plaintiffs from proceeding at law, in an ejectment, but dismisses the bill.

Note. This differed from the case of *Goodwin* v. *Clark*, 1 Lev. 35, where a settlement was on husband and wife for their lives, remainder to the first, &c., son in tail male, and if the husband should die without issue male, remainder to the daughters for a term of years, for the raising of £1500 for their portions; and the husband died leaving issue a son and a daughter, after which the son died without issue:

Whereupon it was adjudged, that the daughter should have the £1500, for that whenever the issue male of the husband failed, he might properly be said to be dead without issue male. 8 Co. 86, *Buckmere's Case.* And this very expectation, remote and precarious as it was (for there being an estate-tail, a recovery suffered by the tenant in tail would have barred the portions expectant thereupon) was, notwithstanding, of advantage to the daughters with respect to their advancement in marriage; whereas in the principal case, the estate being a fee, no recovery could be suffered thereof, and consequently there was danger of a perpetuity.

HUGHES *v.* SAYER.

CHANCERY. 1719.

[*Reported* 1 *P. Wms.* 534.]

JOHN HUGHES, after several legacies, by his will directed that the surplus of his personal estate should be divided by his executors into ten shares, three shares whereof should be paid to his nephew and

niece, Paul and Anne Hughes, children of a deceased brother, *and upon either of their dying without children, then to the survivor*, and if both should die without children, then to the children of the testator's other brothers and sisters.

The question was, whether this devise over of a personal estate upon the devisee's dying without children, was good or not?

And his Honor [Sir Joseph Jekyll, M. R.], having taken time to consider it, gave judgment that the word (children) when unborn, had been in case of a will construed to be synonymous with *issue*, and therefore would in a will, create an estate tail; and if the word (children) was understood to be the same with *issue* in the present case, then the devise over of the personal estate upon a death without issue would be void; but that here the words (dying without children) must be taken to be *children living at the death of the party*. For that it could not be taken in the other sense (that is) whenever there should be a failure of issue, because the immediate limitation over was to the *surviving devisee*, and it was not probable, that if either of the devisees should die leaving issue, the survivor should live so long as to see a failure of issue, which in notion of law was such a limitation as might endure forever.

And therefore, by reason of the limitation over in case of either of the devisees dying without children, then to the survivor, the testator must be intended to mean a dying without children, living at the death of the parent, consequently the devise over good.

FORTH *v.* CHAPMAN.

Chancery. 1720.

[*Reported* 1 *P. Wms.* 663.]

This cause was reserved for the judgment of the *Master of the Rolls* [*Sir Joseph Jekyll*], who after time taken to consider thereof, gave his opinion. The case was,

One Walter Gore by will devises thus: all the residue of his estate real and personal he gave to John Chapman in trust, only the lease of the ground he held of the school of Bangor, for the use of his nephews William Gore and Walter Gore during the term of the lease as hereinafter limited, and having given several legacies, declared his will as to the remainder of the said estate, as well as his freehold house in Shaw's Court, with all the rest of his goods and chattels whatsoever and wheresoever, he gave to his nephew William Gore; and if either of his nephews *William or Walter should depart this life and leave no issue for their respective bodies*, then he gave the said [leasehold] premises to the daughter of his brother William Gore, and the children of

his sister Sibley Price; upon which the question arose, whether the limitation over of the leasehold premises to the children of the devisor's brother and sister, was void as too remote?

The court was of opinion that the devise over was void, and said that had the words been, if A. or B. should die without issue, the remainder over; this plainly would have been void, and exactly the case of *Love and Wyndham*, 1 Sid. 450; 1 Vent. 79; 1 Mod. 50.

Now there is no diversity betwixt a devise of a term to one for life, and if he die without issue, remainder over, and a devise thereof to one for life, with such remainder, if he die leaving no issue; for both these devises seem equally relative to the failure of issue at any time after the testator's death; and for this the court cited and much relied upon 1 Leon. 285, *Lee's Case*, where one devised lands to his second son William, and if William should depart this life not *having* issue, then the testator willed that his sons-in-law should sell his lands, and died: William had issue a son at the time of his death, who afterwards died without issue; upon which it was clearly resolved by the whole court, that though literally William had issue a son at his death, yet when such issue died without issue, there should be a sale; for at what time soever there was a failure of issue of William, he upon the matter died without issue. And in a *formedon* in reverter or remainder, whenever there is a failure of issue, then is the first donee, in supposition of law, dead without issue.

His Honor mentioned the case of *Hughes and Sayer*, which he himself upon consideration had determined; and said there was a diversity betwixt issue and children, issue being *nomen collectivum;* and also between things merely personal and chattels real; more particularly in the case of *Hughes and Sayer*, by the devise over of the money to the survivor, if either of the donees should die without children, the testator of necessity must be intended to mean a death of the donee without children living at his death; for to wait until a failure of issue, might be to wait forever.

It being also debated by counsel, where the residue of the term vested, in regard the devise was to William and Walter Gore: the court declared that the subsequent words increased their interest, and gave the whole term to them, it being plainly intended to dispose of and devise away the whole term from the testator's executors; that a devise of a term to one for a day or an hour, is a devise of the whole term, if the limitation over is void, and it appears at the same time that the whole is intended to be disposed of from the executors.

Afterwards in Trin. Term, 1720, this case coming before Lord Parker upon an appeal, his Lordship reversed the decree; and said, that if I devise a term to A. and if A. die without leaving issue, remainder over, in the vulgar and natural sense, this must be intended if A. die without leaving issue at his death, and then the devise over is good; that the word [die] being the last antecedent, the words [without leaving issue] must refer to that. Besides, the testator who is

inops concilii, will, under such circumstances, be supposed to speak in the vulgar, common and natural, not in the legal sense.

His Lordship likewise took notice that in a *formedon* in remainder, where tenant in tail leaves issue, which issue afterwards dies without issue, whereupon such writ is brought, the *formedon* says, that the tenant in tail did die leaving issue J. S. which J. S. died afterwards without issue, and so the first donee in tail died without issue, thus the pleading says, that the donee in tail died leaving issue at his death; consequently the words [leaving issue] refer to the time of the death of the tenant in tail, and if the words of a will can bear two senses, one whereof is more common and natural than the other, it is hard to say a court should take the will in the most uncommon meaning; to do what? to destroy the will.

2dly, he said that the reason why a devise of a freehold to one for life, and if he die without issue, then to another, is determined to be an estate-tail, is in favor of the issue, that such may have it, and the intent take place: but that there is the plainest difference betwixt a devise of a freehold, and a devise of a term for years; for in the devise of the latter to one, and if he die without issue, then to another, the words [if he die without issue] cannot be supposed to have been inserted in favor of such issue, since they cannot by any construction have it.

3dly, his Lordship observed what seemed very material, (and yet had been omitted in the pleadings, and also by the counsel at the bar) that by this will the devise carried a freehold as well as leasehold estate to William Gore, and if he or Walter died leaving no issue, then to the children of his brother and sister, in which case it was more difficult to conceive how the same words in the same will, at the same time, should be taken in two different senses. As to the freehold, the construction should be, if William or Walter died without issue *generally*, by which there might be *at any time* a failure of issue; and with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death:* however, Lord Chancellor said, it might be reasonable enough to take the same words, as to the different estates, in different senses, and as if repeated by two several clauses, viz. I devise to A. my freehold land, and if A. die without leaving issue, then to B., and I devise my leasehold to A. and if A. die without leaving issue, then to B., in which case the different clauses would (as he conceived) have the different constructions above-mentioned to make both the devises good; and it was reasonable it should be so, *ut res magis valeat quam pereat.*

TROTTER *v.* OSWALD.

CHANCERY. 1787.

[*Reported* 1 *Cox*, 317.]

THE Bishop of Raphoe in Ireland, by his will in July, 1776, gave all the residue of his property whatsoever, both real and personal, in trust to the plaintiff Trotter, and to another trustee, "for the use of John Bogle during his life, and to the lawful heirs of his body after his demise, but in case of his dying without issue of his body, after his decease I give all such residue to John Oswald."

The question was, whether the limitation to John Oswald was or was not too remote.

Pinbury v. *Elkin*, 1 P. W. 563, and *Theebridge* v. *Kilburne*, 2 Ves. 233, were cited.

MASTER OF THE ROLLS. [SIR LLOYD KENYON.] In general, words which give an estate tail in land, give the absolute property in personal estate, and a limitation over of personalty, after an indefinite failure of issue, is clearly void; but if the failure of issue is limited within a certain bound prescribed by law, then such limitation is allowed. The questions therefore on this subject, are questions of construction, viz., whether, according to the fair construction of the words, such limits are transgressed. In this case I think a doubt can scarcely be framed. The residue is first given to Bogle and the lawful heirs of his body; if the will had stopped here, it would most clearly have given him the absolute property; so, if it had rested on the words, "if he die without issue;" but the important words follow, viz. "after his decease I give," &c. These make it a contingency with a double aspect; if he had a child at his death, then the limitation over would be at an end; but if not, the limitation over is within legal limits. This was therefore a good limitation in its creation. The event which may give it effect, or destroy it, is still in the womb of time; and therefore at present no direction can be given.[1]

ROE *v.* JEFFERY.

KING'S BENCH. 1798.

[*Reported* 7 *T. R.* 589.]

THE following case was reserved on the trial of this ejectment at the last summer Warwick assizes for the opinion of this court.

J. Goodacre, being seised in fee of the premises in question, by will dated 20th May, 1754, devised to his wife A. Goodacre for life, after

[1] See *Ex parte Davies*, 2 Sim. N. S. 114 (1851); 2 Jarm. Wills (4th ed.) 522–525.

her decease to his daughter Mary Friswell, wife of W. Friswell for life, and after her death to his grandson T. Friswell, son of W. and M. Friswell and to his heirs forever; "but in case his said grandson T. Friswell should *depart this life and leave no issue*, then (his will was) that the said dwelling-house, &c., should be and return unto Elizabeth, Mary, and Sarah, the three daughters of W. and M. Friswell or the survivor or survivors of them to be equally divided betwixt them share and share alike;" nevertheless his will was that the said premises should go to his son W. Goodacre for life immediately after the decease of his wife A. Goodacre, "and after his decease the said premises and every part thereof to go as above mentioned to his daughter M. Friswell and her issue as aforesaid." On the devisor's death in 1757, his wife A. Goodacre entered, and continued in possession until her death in April 1762, when W. Goodacre the son entered. In Trinity term 1764 the said Mary Friswell the daughter (her husband being then dead), Thomas Friswell the grandson and W. Goodacre levied a fine of the premises in question, the uses of which were declared to be to E. Inge to make him tenant to the *præcipe* in order that a common recovery might be suffered; in the Trinity term following a recovery was suffered, and the uses were declared to be to T. Goodacre and T. Cater his trustee, who afterwards conveyed the premises to W. Jeffery one of the defendants. T. Friswell, the devisor's grandson, died in September 1766 unmarried and without issue, never having been in the possession of the premises. Mary Friswell, the daughter, died in February 1779. And W. Goodacre, the last tenant for life, died in March 1795. Sarah Friswell, one of the daughters of W. and M. Friswell, died in August 1782; Elizabeth another of the daughters and one of the lessors of the plaintiff married Sheers and survived him; and Mary the third daughter married J. Mawson, and they are the other two lessors of the plaintiff. The above defendants are tenants in possession of the whole of the premises. An actual entry was made by the lessors of the plaintiff after the death of W. Goodacre and before the day of the demises laid in the declaration.

This case was argued in last Michaelmas term by,

Reader, for the plaintiff.

Romilly, contra.

The court said they would consider of the case; but

Lord Kenyon, C. J., then said that the distinction taken in *Forth v. Chapman*, that the very same words in the same clause in a will should receive one construction as applied to one species of property and another construction as applied to another, was not reconcileable with reason: but that if it had become a settled rule of property it might be dangerous to overturn it. That it had been quarrelled with by different judges, and that small circumstances had been relied on to take particular cases out of the rule. His Lordship added that he had then formed no decisive opinion of this case, but that it appeared to

him that there were circumstances in the case to show an intention in the testator that by *leaving no issue* he meant a *failure of issue of T. Friswell at the time of his death*, the remainders over being life estates only. That he was not then prepared to unsay what he had said in *Porter* v. *Bradley*, 3 T. R. 146, in which he had not given any judicial opinion respecting the distinction taken in *Forth* v. *Chapman*, but had merely said that it required a good deal of argument to convince him of the propriety of that distinction.

The case accordingly stood over, and now

Lord Kenyon, C. J., delivered the opinion of the court, after stating the case.

When we read this case at first, it appeared to us that there was no difficulty in it: but the defendant's counsel, in arguing it, seemed to think that if we decided against his client the established law of the land would be overturned, and he pressed the case of *Forth* v. *Chapman* on us with peculiar force. But it did not strike me in the same light, and on the best consideration that I have since been able to give to it at different times I think that this is a clear case and may be decided on principles that have not been disputed for a century. We had occasion a few days ago to advert to this doctrine, when we said that this is a question of construction depending on the intention of the party; and nothing can be clearer in point of law than that if an estate be given to A. in fee, and by way of executory devise an estate be given over which may take place within a life or lives in being and 21 years and the fraction of a year afterwards, the latter is good by way of an executory devise. The question therefore in this and similar cases is, whether from the whole context of the will we can collect that, when an estate is given to A. and his heirs forever but if he die without issue then over, the testator meant dying *without issue living at the death* of the first taker. The rule was settled so long ago as in the reign of James the First, in the case of *Pells* v. *Brown*, Cro. Jac. 590, where the devise being to Thomas the second son of the devisor and his heirs forever, and if he died without issue living William his brother then William should have those lands to him and his heirs forever, the limitation over was a good executory devise. That case has never been questioned or shaken, but it has been adverted to as an authority in every subsequent case respecting executory devises; it is considered as a cardinal point on this head of the law, and cannot be departed from without doing as much violence to the established law of the land as (it was supposed by the defendant's counsel) we should do if we decided this case against him. On looking through the whole of this will we have no doubt but that the testator meant that the dying without issue was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, and life estates are only given to them. Now taking all this into consideration together, it is impossible not to see that the failure of issue intended by the testator was to be a failure of

issue at the death of the first taker; and if so, the rule of law is not to be controverted. It is merely a question of intention, and we are all clearly of opinion that there is no doubt about the testator's intention. The consequence of this is that there must be judgment for the plaintiff.

Postea to the plaintiff.[1]

[1] Cf. *Barlow* v. *Salter*, 17 Ves. 479 (1810).

NOTE. — See also *Crowder* v. *Stone*, 3 Russ. 217 (1827), p. 238 *ante*.

When there is a gift to a certain class of issue, and then a gift over "upon failure of issue," "issue" is often construed as meaning the class of issue before mentioned. See Hayes, Principles, 28–46; 2 Jarm. Wills, *c.* 40; *Pride* v. *Fooks*, 3 De G. & J. 252, 280 *et seq.* (1858).

CHAPTER IX.

VESTING OF LEGACIES.

CLOBBERIE'S CASE.

CHANCERY. 1677.

[*Reported* 2 *Ventr.* 342.]

IN one Clobberie's Case it was held, that where one bequeathed a sum of money to a woman, at her age of twenty-one years, or day of marriage, to be paid unto her with interest, and she died before either, that the money should go to her executor; and was so decreed by my LORD CHANCELLOR FYNCH.

But he said, if money were bequeathed to one at his age of twenty-one years; if he dies before that age the money is lost.

On the other side, if money be given to one, to be paid at the age of twenty-one years; though, if the party dies before, it shall go to the executors.[1]

YATES *v.* PHETTIPLACE.

CHANCERY. 1701.

[*Reported* 2 *Vern.* 416.]

THE defendant's father had mortgaged his manors of Pudlicoat, and afterwards entailed the equity of redemption on the defendant his son; and by will devised some leasehold and personal estate to be applied for the payment of his debts and legacies; directing that if his personal estate was applied to pay off his mortgage, the same should be kept on foot to make good his daughter's portion, and thereby devised to his daughter £3000 to be paid her at *twenty-one*, or marriage, if married with consent, if not, then but £1000, and died, leaving issue the defendant his only son, and a daughter; the daughter died when but six years old, to whom the mother, late the wife of the plaintiff Yates, took administration; and Mr. Yates was her executor as also administrator *de bonis non* to the daughter, and was now plaintiff to have the £3,000 portion.

And for the plaintiff it was insisted, this was not within the reason

[1] S. c. *sub nom. Cloberry* v. *Lampen*, Freem. C. C. 24. The decree was confirmed in the House of Lords.

of the case of *Pawlet and Pawlet* [1 Vern. 204], that the portion should extinguish in the land for the benefit of the heir.

First, there the settlement was by deed, here the portion is provided by will.

Secondly, there it was to be raised only out of the land; here the personal estate is liable as well as the land, and has been applied in part to pay off the mortgage that was on land.

But the COURT [SIR NATHAN WRIGHT, LORD KEEPER] dismissed the bill, and declared it to be within the reason of the *Lord Pawlet's Case*, and besides the devise being of £3000 at *twenty-one* or marriage, which marriage was to be with consent, it did not vest in the daughter, but was contingent; and the Lord Keeper was of opinion that a devise to J. S. of £1000 to be paid at *twenty-one*, and a devise to him at *twenty-one* was all the same, and the testator's intention the same in both cases; and said the distinction taken by *Swinbourne and Godolphin* between the age being mentioned in the body of the devise, and where in the time of payment, he looked upon it as a *distinction without a difference*, and that the authorities they cited did not come up to what they laid down.[1]

CHANDOS *v.* TALBOT.

CHANCERY. 1731.

[*Reported* 2 *P. Wms.* 601.]

THE last question[2] was touching the legacy of £500 which by the first part of the will of Sir Thomas Doleman was given to his nephew Lewis Doleman, to be paid at his age of twenty-five, and so a vested legacy as to the personal estate, after which the testator's real estate was charged therewith; and in regard Lewis Doleman died an infant of about the age of fifteen, and before the time appointed for the payment, it was insisted that this being a legacy charged upon land, did sink for the benefit of the *hæres factus* or *natus;* that here the premises chargeable with this legacy, amongst other parts of the real estate of the testator, were devised to trustees and their heirs, upon the trusts and to the uses hereinbefore mentioned; it was true in case of a bequest of any sum of money out of a personal estate to one, *to be paid* at his age of twenty-one or twenty-five, if the legatee dies before the time of payment, it becomes notwithstanding a vested legacy transmissible to executors or administrators; but where such legacy is devised out of a real estate, and the legatee dies before the time appointed for payment, there the legacy shall sink into the land; because equity will not load an heir for the benefit of an executor or administrator.

[1] The decree was affirmed in the House of Lords.

[2] Only part of the case is here given.

At another day, this cause having been adjourned in order to search precedents, the Lord Chancellor [King] said he had looked into the case of *Yates and Phettiplace* in 2 Vern., and also that of *Jennings and Lookes* [2 P. Wms. 276], both which came fully up to the present case, viz., that where the personal estate was not sufficient, and the real estate in failure thereof was made liable to answer the legacies, in case of the legatee's dying before the legacy became due, the charge upon the land determined; that it seemed but a very slight and superficial diversity between a legacy given *at* twenty-one, and *payable* at twenty-one; and though it had been established in the spiritual court, as to legacies given out of a personal estate, it did not deserve to be favored or countenanced, where the legacy is charged upon land, and the infant legatee dies before twenty-one, or before the time when the legacy is made payable; that there was not any the least difference between a sum of money charged by a will on land, payable to an infant at twenty-one, and where such charge arises by a deed. That the authorities before mentioned show there is no difference where the real as well as the personal estate is charged, for in such case, as far as the executor or administrator claims out of the latter, he shall succeed according to the rule of that court where these things are determinable, even though the infant legatee dies before the time of payment, but as far as the legacy is charged upon the land, so far shall it, on the legatee's dying before the legacy becomes payable, sink; and this being the rule which has of late universally prevailed, be the legatee a child or a stranger, it would be of the most dangerous consequence, and disturb a great deal of property for him to break into it.

Wherefore he thought that the £500 legacy payable to Lewis Doleman at twenty-five, on his dying before that time, as to so much thereof as was payable out of the land, must sink.[1]

[1] "As to what is said, that the assets may be so marshalled as for the present plaintiff to receive a complete satisfaction out of the personal estate, though the executors were not before the court, and so impossible to make any decree on that foot, yet if they thought it would be material, he would retain the bill, with liberty to make the executors parties; but he said, he conceived that point could by no means be maintained, for that rule of marshalling assets in the manner before mentioned, would hold only where it was proper to be done at the time the legacy first took place, and not where it was owing to a fact, which happened subsequent to the death of the testator, and to a mere accident, as here, the death of the legatee before twenty-one."

"I have often heard it said, that the reason why legacies, &c., charged on land, payable at a future day, shall not be raised, if the legatee dies before the day of payment, though it is otherwise in the case of a charge on the personal estate, is this, that the heir is a favorite of a court of equity, and ought to have the preference of the representative of a legatee, and likewise that the court will go as far as they can in keeping the real estate entire, and as free from encumbrances as possible.

"But I think the court has never gone upon such reason, but the true reason I take to be this, that the court will govern themselves as far as is consistent with equity by the rules of the common law. In the case of personal estate, the rule is the same here as in the civil law, that there may be an uniformity of judgments in the different courts; but in the case of lands, the rule of the common law has always been adhered to: as suppose a person should covenant to pay money to another at a future day, if the cov-

KING *v.* WITHERS.

CHANCERY. 1736.

[*Reported* 2 *Eq. Cas. Ab.* 656, *pl.* 10.]

J. S. BEING possessed of a considerable real and personal estate, devises thus, viz.: "I give and bequeath unto my daughter M. at her age of twenty-one, or day of marriage, which shall first happen, the sum of £2500, *and* my will and meaning is, that if my son A. should die without issue male of his body then living, *or* which may afterwards be born, *that then* my said daughter should have and receive at her age of twenty-one, or day of marriage, which shall first happen, the farther sum of £3500 over and above the said sum of £2500. *But* in case the contingency of my said son's dying may not happen before the said age of my daughter, *or* her day of marriage, *that then she shall receive and be paid the sum of* £3500 whenever it might after happen." Then the testator *devises his real estate to his son in tail*, and *for want of such issue*, remainder *to his brother in fee;* and then *says*, "And my will and meaning is, that the lands and premises hereby devised shall be liable to and chargeable with the payment of the said sum of £3500 whenever it shall become due and payable;" and directs, *that in case of failure of issue of his son, his daughter, her heirs or assigns, should join in a surrender of some copyhold lands to the use of his brother, otherwise the legacy of* £3500 *to be void.* The daughter marries, having attained her age of twenty-one, and dies in her brother's life time, leaving the plaintiff her husband, who administered to her, and then her brother dies without issue male. And the question was, whether the £3500 legacy should be raised out of the *land*, the *personal* estate being deficient? And whether it was such an interest in the daughter as should go to her administrator? And LORD CHANCELLOR observed, that three things were by the will necessary to happen to entitle M. to this legacy of £3500, *viz.* the death of A. the son without issue male, marriage, or *attaining her age of twenty-one;* and that all three had happened; and that though it is to be raised out of land, it remains money still; and though she has not lived to receive it, yet the contingency having happened, it must go to her husband, who is her representative, and who may well be thought to have married in contemplation of this additional fortune of £3500 though depending upon a contingency; and decreed accord.[1]

enantee dies before the day of payment, the money is not due to his representative. The same rule holds in the case of a promise to pay money." — *Per* LORD HARDWICKE, C., in *Prowse* v. *Abingdon*, 1 Atk. 482, 486 (1738). See, *accord.*, *Pearce* v. *Loman*, 3 Ves. 135 (1796).

[1] S. C. Cas. temp. Talb. 117. The decree was affirmed in the House of Lords.

"It is a well-established rule as to portions or legacies payable out of lands, that if made payable at a certain age, a marriage, or other event personal to the party to

ATKINS *v.* HICCOCKS.

CHANCERY. 1737.

[*Reported* 1 *Atk.* 500.]

A TESTATOR devises in these words, "I devise to my daughter Elizabeth Hiccocks, the sum of £200 to be paid her at the time of her marriage, or within three months after, provided she marry with the approbation of my two sons William and Samuel Hiccocks, or the survivor of them; and my will is, that my said daughter Elizabeth shall yearly receive, and be paid, until such time as she shall marry, the sum of twelve pounds, free and clear of all taxes and impositions whatsoever." And willed, that his leasehold estate called , should stand charged with the payment of the said £12 *per annum*, and likewise with the payment of the £200 when the same should become due, and devised the said leasehold premises, and his whole personal estate, to his two sons, and made them his executors.

Elizabeth died after 21, but without being married; and the present plaintiff, as her administrator, brought a bill against the executors of Hiccocks for the £200.

The general question, Whether the legacy vested in Elizabeth, and whether it so vested as to be transmissible to her administrator?

LORD CHANCELLOR [HARDWICKE]. I am of opinion this was not a vested legacy; in the common cases of legacies to be paid at the age of 21, there is a certain time fixed, not to the thing itself, but to the execution of it, and the time being so fixed, must necessarily come: but when the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this court, where it has been held that the legacy at all events should be paid. The rule as to the vesting is founded upon another rule, *certum est quod certum reddi potest*, and it is plain that the testator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition be satisfied.

It has been argued by *Mr. Attorney-General*, that this bequest

be benefited, and such party die before that time arrive, the portion or legacy is not to be raised out of the land; but if the payment be postponed until the happening of an event not referable to the person of the party to be benefited, but to the circumstances of the estate out of which the portion or legacy is to be paid, such as the death of a tenant for life, then it will be raisable after the death of the tenant for life, although the term out of which it was to be raised had not arisen in consequence of the party to be benefited not having been *in esse* at the time of the death of the tenant for life, as in *Emperor* v. *Rolfe*, 1 Ves. Sen. 208; *Cholmondley* v. *Meyrick*, 1 Eden, 77, 85; and many other cases." — *Per* LORD COTTENHAM, C., in *Evans* v. *Scott*, 1 H. L. C. 43, 57 (1847). Cf. *Packham* v. *Gregory*, 4 Hare, 396 (1845); *Fuller* v. *Winthrop*, 3 Allen, 51 (1861).

differs not from a legacy given *to be paid at* 21, which vests immediately, and the time of payment only is postponed.

But it has been always held, with regard to such a limitation of payment at 21, that it is *debitum in præsenti, solvendum in futuro*, and the payment postponed merely on account of the legatee's legal incapacity of managing his own affairs till that age; and this has been the established rule of this court ever since *Cloberie's Case*, 2 Ventris 342.

In the Digest, lib. 35, tit. 1, *lex* 75, *de Conditionibus*, &c., it is held that *dies incertus conditionem in testamento facit*, and these are the words of the text, and not of the commentator; so that a time absolutely uncertain is put on the same footing as a condition; but as the civil law is no further of authority than as it has been received in England, let us see what our own authors say. Swinbourn, part 4, sec. 17, page 267, old edition, makes a difference between a certain and an uncertain time, and lays it down, that if a legacy is given to be paid at the day of marriage, and the legatee die before, the legacy is lost. God. Orp. Leg. 452, is to the same effect.

It has been insisted, that the testator's giving £12 *per annum* to Elizabeth till the contingency of her marriage, is in the nature of interest for the £200 and that from thence it appears to be his intention, that the legacy should vest in the mean time; but whenever this doctrine has been allowed, the payment of the principal hath been certain, and so not similar to the present case, because here this is not meant as interest, for it is an annuity of £12 *per annum* charged upon, and issuing out of an estate.

The case in 1 Salk. 170, *Thomas* v. *Howell*, was plainly a condition subsequent, and being made impossible by the act of God, it was adjudged that the condition was not broken, and consequently should not devest the estate out of the devisee.

The second point is very strong against the transmissibleness, which is her marrying with the consent of her two brothers, and shows plainly the testator intended a condition precedent, *that if she married she was to have* £200 *for her portion;* but if she died before, there was no occasion to have it raised for the benefit of a stranger.

It is true indeed, as there is no devise over, the clause of consent might be only *in terrorem*, but in all cases, where the condition of marrying is annexed, it is necessary that the condition, as to the marrying at least, should be performed, though she is not obliged to marry with consent.

I am the more satisfied, because it appears to be the intention of the testator, that this £200 should be in the nature of a marriage portion, for he has taken it out of a leasehold estate; and if she did not marry, it was manifestly his design that it should sink in that estate for the benefit of his sons: therefore I think this bequest is to be considered as a condition precedent, which not being performed, the legacy did never vest, and consequently the administrator can make no title to it. The bill dismissed.

HOATH *v.* HOATH.

CHANCERY. 1785.

[*Reported* 2 *B. C. C.* 3.]

UPON a petition, the testator, by his will, gave a sum of £100 to Thomas Hoath, at his age of twenty-one, and directed the interest, in the mean time, to be paid to his mother for his maintenance. Thomas Hoath dying under age, the question was, whether this legacy was, or was not, vested.

LORD CHANCELLOR [THURLOW] said, it was impossible now to contend that where the interest of a legacy is given to the legatee, until the time of payment of the principal, that it is not a vested legacy; and the giving the interest for his maintenance is precisely the same thing.

PULSFORD *v.* HUNTER.

CHANCERY. 1792.

[*Reported* 3 *B. C. C.* 416.]

WILLIAM RICHARDS, by will, dated 3d September, 1775, devised his freehold estates in the city of London, and elsewhere, to trustees for the term of ninety-nine years, and subject to the term, as to one undivided moiety, during the life of his daughter Mary Pulsford, to pay the rents and profits to her for her separate use, remainder to the use of all and every the child and children of Mary Pulsford, equally to be divided between them, if more than one, share and share alike, as tenants in common, and of the several and respective heirs of the body or bodies of all such child or children issuing, with survivorship, among them; remainder to Jane Jennings, another daughter of testator, to her separate use, and to her issue in tail in like manner; and as to the other undivided moiety, he gave the same to the trustees, in trust, during the life of his said daughter Jane Jennings, to pay the rents, &c. to her sole and separate use; remainder to her child or children in tail; remainder to the separate use of his daughter Mary Pulsford, in like manner, with remainder over, in case of default of issue of both his said daughters.

The trusts of the term of ninety-nine years were declared to be, that the trustees and the survivor of them should, after the testator's death, and during the lives of his said two daughters, and the survivor of them, receive and take out of the rents and profits of the premises comprised in the term, so much money as they, or the survivors of them, should think or find necessary for the maintenance and education of the children of his daughters begotten or to be begotten, and pay the

same, for that purpose, in such manner, shares, and proportions, as they or the survivors of them should, in their discretion, think fit, without any regard or consideration being had to either of his daughters having more children than the other of them, it being his intention that his grandchildren should be educated out of the whole rents and profits, to such extent as the trustees should think fit, before any division should be made of the profits between his daughters, and then the surplus was to be divided between the persons entitled to the real estate of freehold, in the proportions in which they were respectively entitled to the same; then the testator gave his leasehold, and other residuary personal estates, to trustees, upon trust to pay the rents, interest, and dividends of a moiety thereof to his daughter Mary Pulsford, for her separate use; and, after her decease, to transfer and assign such moiety unto and among all and every the child or children begotten or to be begotten, who shall be living at the time of her decease, equally between them; and if one, only to such one; and in case of no issue, over to Jane Jennings for life, &c.; then the other moiety of the personal estate was limited to Jane Jennings for life, to her separate use, and then to her children, as in the bequest to Mary Pulsford.[1]

The master found that Mary Pulsford had issue at the time of the testator's decease, the plaintiffs, William, Mary, Ann, and Jane Pulsford; and, since the testator's decease, had issue the defendant Sarah Pulsford, who are all now living; and that Jane Jennings had issue at the time of the death of the testator, one child, Richard Jennings, the plaintiff in the second cause, and, since the death of testator, had had no issue.

Another question was, whether the bequest should be confined to the grandchildren living at the death of the testator, or whether Sarah Pulsford, born after, should have a share.

And Lord Chancellor [Thurlow] held that she should: that all the children born before the division was actually to take place, that is, until some one of them should attain twenty-one, should take a share.

It was urged, that here maintenance was given, that maintenance was equivalent to interest, and that the giving interest had been held to vest the legacy.

But Lord Chancellor thought, that however it might be where interest is given, yet that the giving maintenance was a different case, and was not equivalent to giving interest; as to this point, *Congreve* v. *Congreve*, [1 B. C. C. 530]; *Andrews* v. *Partington*, [3 B. C. C. 60]; *Gilmore* v. *Severn*, [1 B. C. C. 582.]

A fourth question was, whether there could be any maintenance for the grandchildren, raised from the profits of the ninety-nine years' term during the lives of their mothers, the fathers admitting themselves to be capable of maintaining them. It was argued (by *Mr. Mitford*), that this was not the usual case in which maintenance, although expressly bequeathed, was not given, provided the parents were capable of

[1] Part of the case, relating to another point, is omitted.

maintaining the children; for the usual case was, where the child, in case no maintenance was allowed, was itself entitled to the benefit of the accumulation.

But Lord Chancellor held they should not have it; and reserved liberty for them to apply for a maintenance, either out of the profits of the term, or of the specific legacy, in case it should become necessary.

BATSFORD *v.* KEBBELL.

Chancery. 1797.

[*Reported* 3 *Ves. Jr.* 363.]

The testatrix gave and bequeathed to Robert Endly the dividends, that should become due after her decease upon £500 Three per cent Bank Annuities, until he should arrive at the full age of thirty-two years; at which time she directed her executors to transfer to him the principal sum of £500 of her Three per cent Annuities for his own use.

Robert Endly died before he attained the age of thirty-two. The bill was filed by the residuary legatee; and the question was, whether the vesting of the legacy or the time of payment only was postponed, till the legatee should attain the age of thirty-two.

Attorney-General [*Sir John Scott*] and *Mr. Johnson*, for the plaintiff.

Mr. Graham and *Mr. King*, for the personal representatives of the legatee.

May 12th. Lord Chancellor [Loughborough]. It strikes me at present, that there is a very precise distinction here between the dividends and the fund. If I construe it a gift of the fund to him, I must strike out the suspension of it till the age of thirty-two. I wish to look at the cases.

May 13th. Lord Chancellor. I have read over the will, and have looked into the cases, and am confirmed in my opinion. Upon the cases it appears, that dividends are always a distinct subject of legacy, and capital stock another subject of legacy. In this case there is no gift but in the direction for payment; and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description. In all the other cases the thing is given, and the profit of the thing is given.

Declare, that this legacy of £500 stock in the event, that has happened, fell into the residue upon the death of Robert Endly; and direct a transfer to the plaintiff.[1]

[1] See *Westwood* v. *Southey*, 2 Sim. N. S. 192, 198–200 (1852); *Spencer* v. *Wilson*, L. R. 16 Eq. 501 (1873); 1 Jarm. Wills (4th ed.) 843, note.

BOOTH *v.* BOOTH.

CHANCERY. 1799.

[*Reported* 4 *Ves. Jr.* 399.]

ROBERT BRAGGE by his will, dated the 21st of January, 1777, devised his real estate to his great-nephew Robert Booth and his issue in strict settlement, with remainder to his brother Richard Booth and his issue in strict settlement; with similar remainders to their sisters Phœbe Booth and Ann Booth, and their issue respectively.

The testator also gave a legacy of £600 to his great-nephew Robert Booth, and £100 to Robert Lathropp, whom he appointed sole executor; and, after giving some other pecuniary legacies, he gave all the residue of his estate and effects, which should remain after paying his debts, funeral expenses, charges of proving his will, and the legacies, to Sir John Chapman and Robert Lathropp, their executors, administrators, and assigns, upon trust as soon after his decease as conveniently might be to collect and get in same, and invest same from time to time in some of the public funds or upon government or real security in their joint names or in the name of the survivor with power to change such funds; and upon trust to pay the dividends and produce thereof, as the same should from time to time become due, equally between his great nieces Phœbe Booth and Ann Booth until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively.

The testator died soon afterwards. Richard Booth took a considerable real estate upon the death of his father.

At the date of the will Phœbe Booth and Ann Booth were both of age; and they filed the bill to have their interests in the residue declared: but the MASTER OF THE ROLLS thought that, as the plaintiffs might marry, the question was not ripe for decision.

By the decree made in that cause on the 13th of June, 1793, the fund was ordered to be transferred to the Accountant-General; and an inquiry was directed for the purpose of ascertaining who were the testator's next of kin at the time of his death.

The report stated that the plaintiffs and their two brothers Robert and Richard Booth were the testator's next of kin at the time of his death; and that the plaintiff Phœbe Booth died in June, 1797, without having been ever married. By her will, made shortly before her death, she appointed her brother, the defendant Richard Booth, and the plaintiff Ann Booth, her executors; and having disposed of certain real estates, and given a legacy of £100 to her brother Richard Booth for his trouble as one of her executors, she gave the residue of her

personal estate to the plaintiff Ann Booth, but with such request annexed, as therein mentioned.

The cause coming on for farther directions, the question was, whether the share of Phœbe Booth in the residue of the personal estate of Robert Bragge under his will was an absolute vested interest in her, to be transferred to her executors, or whether in the event of her having died unmarried it belonged to the next of kin of Robert Bragge as undisposed of.

Mr. Lloyd and *Mr. Wooddeson*, for the plaintiff.

Mr. Graham, for the defendants.

Master of the Rolls. [Sir Richard Pepper Arden.] This case deserved very great consideration, lest it should be supposed, that the court had by deciding it transgressed the rule laid down as to legacies given payable at an uncertain time. When it was argued, I was impressed with an idea, that it was distinguishable from all the cases in respect of its being not the case of a legacy, but a residue; and all the cases, in which that rule prevailed, were cases of mere legacies, to be paid out of the personal estate by the executor; the residuary legatee, or the executor, if he was to have the residue, having only to pay at the time the legacy became due, and taking the residue. But this is not that case, but the case of a residue.

I do not see, that any of the pecuniary legacies are given to Phœbe and Ann Booth; though I do not think, that would make much difference: they are both comprehended in the limitations of the real estate. It is to be observed, that Robert Lathropp only is executor: Sir John Chapman is a trustee, but not executor. Therefore it is not a gift of the residue to the executor, but to him and another person upon these trusts. Both these residuary legatees were adults at the time the residue was given to them: if it had been otherwise, it might have made some ingredient in the argument. The event that has happened, is that one of them has died without having ever been married; and the bill[1] is filed by her sister claiming under her will, and insisting, that she was entitled, though she never married; that marriage was not a condition precedent, upon which the residue was to vest; but merely denoted the time, at which the residuary legatees were to be put in full possession of the property.

The argument upon the part of the plaintiff turned upon a ground, that is frequently taken upon legacies payable at a future day, which on account of the death of the legatee never arrives; that the time being mentioned merely as the time of payment on account of the situation and circumstances of the party is never held to defeat the legacy. The cases were commented upon on both sides. *Atkinson* v. *Paice* [1 B. C. C. 91], was mentioned; which I lay out of the case. It does not prove much. Of the other cases, *Boraston's Case* [3 Co. 19 *a*], *Doe* v. *Lea* [3 T. R. 41], *Goodtitle* v. *Whitby* [1 Burr. 228], and *Mansfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, are in favor of the

[1] A supplemental bill was filed after the report in the original cause.

plaintiff: but it was properly observed, they were all cases of an absolute interest; the possession of which was to be given at a certain time. The reasoning upon them would be sufficient for the plaintiff, if applied to this case; for the reasoning is, that though the testator has given a partial interest till that time, those words of reference as to the time are not to be considered as referring to the time, upon which only the devise is to take place, but the time, at which the devisee or legatee is to be entitled to the full and absolute benefit of the bequest; and a reason is given, which does not apply to this case, that it cannot be supposed, that, if the devisee or legatee should die before that time, leaving children, the intention was, that children should not take. I shall not comment upon the cases. The arguments of the judges, who decided them, are very full to show, that such words do not make a condition precedent, but merely denote the time of absolute possession.

It is very true, the cases relied on by the defendant, *Garbut* v. *Hilton* [1 Atk. 381], *Atkins* v. *Hiccocks* [Ib. 500], and *Elton* v. *Elton* [3 Atk. 504], are very distinguishable from this. First, they are all cases of mere legacy, not of a residue: secondly, in the very gift of the legacy it is perfectly clear, as Lord Hardwicke observes in *Elton* v. *Elton*, that they are all cases of a condition absolutely precedent. It is impossible not to see, that the testator meant the legatee to bring himself into the circumstances specified. In all those cases the legacy was given upon a marriage with a given consent. It is impossible in that sort of case to say, the legatee could be entitled without that. It would be to put a violation upon the very words of the bequest. Therefore the plaintiff's counsel are fully justified in saying, those cases cannot be brought to bear upon this question. They are cases of legacies, and conditions precedent. They were considered and determined as such.

For the defendant, besides the cases, I have mentioned, the late case of *Batsford* v. *Kebbell* [3 Ves. Jr. 363], was relied on; in which the Lord Chancellor took a great distinction between a bequest of a sum of money payable at a future time and a gift of the interest until a certain time and then a gift of the principal. His Lordship gives a short judgment; but upon consideration of all the cases he laid it down, that it is necessary to show, the principal was intended to be given, before the time arrived: and in that case he for that reason held, the legacy (for that was the case of a legacy) never attached.

It is to be considered, whether this case is in its circumstances distinguishable from all these cases; and I am of opinion, it is. It is distinguished from *Batsford* v. *Kebbell* in this respect: that this is in fact an absolute gift of the residue to trustees. It may be said, so much of the trust as is not sufficiently declared must go to the person, who would be entitled, in case there was no disposition: but I think, it is equivalent to saying, in trust for them, to pay and dispose of the dividends and interest to them till their respective mar-

riages, and then to assign and transfer the principal: for it is not merely a gift of the interest until marriage, stopping there, and after the marriage a gift of the principal: but it is impossible not to see, that these words are equivalent to a gift of the principal. The testator considers it as given. He speaks of it as their shares of the residue. The day of their marriage is the time, at which they are to be put into actual possession of their shares. I cannot construe this otherwise than an absolute gift of the residue, qualified only thus, that until their marriages, until when, I suppose, he thought they would not want it, they were not to have the actual possession.

That there is a difference between a bequest of a legacy and a residue with reference to this point cannot be denied either upon principle or precedent. Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property. How did this testator dispose of it? It might be supposed natural, that they would marry. It might be in his idea, that there might be a possibility, that they might not marry. If he did not mean by the residuary bequest to dispose of the absolute interest, it was natural, that he should declare, what should be the case, if they should not marry. He has done that. So much as to the principle.

Next, how far in point of precedent has a gift of the residue been held distinguished from a mere legacy? In *Monkhouse* v. *Holme*, 1 Bro. C. C. 298, Lord Loughborough comments upon all the cases; and among others mentions *Love* v. *L'Estrange* [3 P. C. C., Toml. ed. 59]; upon which I mainly rely in this case. His Lordship says, that case was determined upon the ground of its being a residue; and, if the report is correct, he gives a decided opinion, that *Love* v. *L'Estrange*, if it had not been the case of a residue, would not have been decided as it was; being of opinion, that, if it had not been the case of a residue, but a legacy, it would not have been a vested interest. I am not now commenting upon the point, whether that argument strictly applies to *Love* v. *L'Estrange*. It is enough for me to avail myself of Lord Loughborough's comment upon it; who was evidently of that opinion upon the ground, upon which *Batsford* v. *Kebbell* was decided. In *Monkhouse* v. *Holme* Lord Loughborough seems to be of opinion, as he was in *Batsford* v. *Kebbell*, that in *Love* v. *L'Estrange*, there being no gift of the principal until the age of twenty-four, and only a partial gift in the mean time, from the age of twenty-one, not so much as the interest, the principal could not attach until that time, unless upon its being the case of a residue; which distinguished it from *Batsford* v. *Kebbell*, a case in other respects very like it. I do not find, that is mainly insisted on in the printed case of *Love* v. *L'Estrange;* and I see, in *May* v. *Wood* [3 B. C. C. 471], I stated that fact, that it was not insisted on; and that I did not see any difference between the cases of a legacy and a residue. If I did say so, I spoke with too much latitude; for I then thought, and I now think, there is a distinction; though in that case it made no difference; the

words being so like those in *Doe* v. *Lea*, and *Goodtitle* v. *Whitby;* in the latter of which some principles are laid down by Lord Mansfield, with regard to all words, that may be construed words of reference to the time, at which possession is to be given, and not words of condition, that seem to me to govern the decision of this case. The first principle laid down by Lord Mansfield is, that wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property.

In that case the estates were given to trustees and their heirs, upon trust to apply the rents and profits for the maintenance and education of the nephews of the devisor during their minorities; and when and as they should respectively attain the age of twenty-one then to the use of his said nephews.

Another principle laid down by Lord Mansfield is, that, where an absolute property is given, and a particular interest given in the mean time, as until the devisee shall come of age, &c., and when he shall come of age, &c., then to him, &c., the rule is, that shall not operate as a condition precedent, but as a description of the time, when the remainder-man is to take in possession.

If this will had mentioned a particular age instead of marriage, there could be no doubt, that these cases would have absolutely governed it; for though I do not deny, that *dies incertus in testamento conditionem facit*, I say, admitting that principle, that marriage is the time, at which they were to be put in possession. It is true, the testator fixes the marriage to the time at which they were to be put in possession. It is not a marriage under any qualification, but whenever they should marry. Where is the absurdity, that that time should be fixed, as the time for their being put into possession? The testator thought that the time at which they might want it, and until which it would be better applied upon that trust for their benefit.

Therefore, without breaking in upon that rule of the civil law, or the cases before Lord Hardwicke, to whose doctrine I wish to refer, that, it is impossible not to see, that the testator in those cases did mean those circumstances to be conditional, I am of opinion, there is nothing in this will to show a condition precedent to the vesting of this interest. Another reason may be given. Suppose, one of these sisters had married, and had children: this interpretation puts it in the power of the other to provide for those children. It has been determined, that where a legacy is given, payable at the age of twenty-four, the legatee at the age of twenty-one may dispose of it by will. The same reason applies to this case.

Upon these circumstances, and the ground, that this is a residue, and upon the words of the bequest in this case, I am of opinion that the plaintiff is well entitled under the will of her sister to her share of the residue.

The counsel for the plaintiff applied for a direction for payment of her moiety.

MASTER OF THE ROLLS. I doubt as to giving that direction. In all these cases the court has never yet accelerated the payment. It may be a vested interest, and disposable, but not tangible in the mean time. It is worth consideration upon the question, whether the survivor has any right to demand payment and to be put in possession of this vested interest until the day of her marriage. Suppose, in *Love* v. *L'Estrange*, where the testator had anxiously given only £10 a year till Walter Nash should attain the age of twenty-four, having attained the age of twenty-one he had brought his bill: does it follow, that he would have been put in possession? No other person could have had any advantage from it in that case. It is like the case of an infant, who may dispose of property, though he cannot have possession of it, until he is of age. I will consider of this point. I am not sure, it may not be a wise provision, intended for the benefit of the legatee.

By the decree it was declared, that the plaintiff Ann Booth and the defendant Richard Booth as executor and executrix of the testatrix Phœbe Booth are entitled to one moiety of the Bank Annuities and Bank Stock, constituting the clear residue of the personal estate of the testator Robert Bragge, and it was ordered, that one moiety of the said Bank Annuities and Bank Stock be transferred accordingly, to be applied by them to the purposes in the said testatrix's will mentioned; and that the interest and dividends to accrue due on the other moiety of the said Bank Annuities and Bank Stock be from time to time paid to the said Ann Booth during her life; and in case of her marriage the said Ann Booth, or in case of her death before marriage any other person interested in the said Bank Annuities and Bank Stock, are to be at liberty to apply to the court, as there shall be occasion.[1]

[1] See *Leake* v. *Robinson*, 2 Mer. 363, 386 (1817). In *Vize* v. *Stoney*, 1 Dr. & W. 337 (1841), SIR EDWARD BURTENSHAW SUGDEN, L. C., held, that legacies (not residuary) to daughters to be paid to them respectively on their respective days of marriage, with the interest from the testator's death, were vested. He said: "I wish it to be distinctly understood, that I do not rest my decision on the authority of *Booth* v. *Booth*, 4 Ves. 399. Lord Alvanley expressly put that case on the ground of its being a gift of a residue, and it could not, therefore, be relied upon by me as an authority for my decision here; but I can and do make use of that case, to this extent, that marriage, though differing materially, as I have admitted, from a contingency depending on a legatee attaining twenty-one, will not prevent a legacy, which is payable upon that event, from being vested, if, upon the whole instrument, it appears that the testator intended it should be vested."

HANSON *v.* GRAHAM.

CHANCERY. 1801.

[*Reported* 6 *Ves.* 239.]

JAMES GRAHAM by his will, dated the 18th of March, 1771, gave to Mary Hanson, Thomas Hanson, and Rebecca Graham Hanson, the three children of his daughter Mary Hanson, £500 apiece of Four per cent Consolidated Bank Annuities, when they should respectively attain their ages of twenty-one years or day or days of marriage, which should first happen, provided, it was with such consent of his executors and trustees as therein mentioned; and he declared, his mind and will was, that the interest of said several £500 amounting in the whole to £1500 Four per cent Consolidated Bank Annuities, so given to his three grandchildren, as aforesaid, as often as the same should become due and payable, should be laid out at the discretion of his executors and trustees in such manner as they or the survivor of them should think proper for the benefit of his said grandchildren, till they should attain their respective ages of twenty-one years or day or days of marriage, and to and for no other use, intent, or purpose whatsoever; and after devising his real and leasehold estates, and giving two legacies of £10 each, he gave all the residue of his personal estate to his son Isaac Graham; and appointed him sole executor.

The testator died soon after the execution of his will. Afterwards, in 1774, Rebecca Graham Hanson died intestate at the age of nine years; leaving her mother and her brother Thomas Hanson and her sister Mary Coates, surviving. The mother died; and bequeathed all her personal estate to her son Thomas Hanson; and appointed him executor.

The bill was filed by Thomas Hanson and Mary Coates against Isaac Graham for an account of what was due in respect of Rebecca Graham Hanson's legacy of £500 &c.

Mr. Richards and *Mr. W. Agar*, for the plaintiffs.

Mr. Romilly and *Mr. Martin*, for the defendant.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] The question is, whether this legacy vested. It is contended for the plaintiffs, that it did vest, upon two grounds: 1st, they say, it would have been vested; supposing, there was nothing more than the words, with which the clause begins; and that if it rested upon a legacy, when the legatee should attain the age of twenty-one or marriage, it is now settled, that these words give a vested interest; and that is established by *May* v. *Wood*, 3 Bro. C. C. 471; and undoubtedly a proposition is there laid down; which would have the effect of making this a vested legacy; if it is true in the extent there stated. The proposition is there laid down very broadly and generally by the late Master of the Rolls; that all the cases for half a cen-

tury upon pecuniary legacies have determined the word "when," not as denoting a condition precedent, but as only marking the period, when the party shall have the full benefit of the gift; except something appears upon the face of the will to show, that his bounty shall not take place, unless the time actually arrived.

This proposition is stated so broadly and generally, that I rather doubt the correctness of the report. Considering the well-known diligence of the late Master of the Rolls in examining cases, and his uncommon accuracy in stating the result of them, he would hardly have drawn this conclusion from an examination of the cases; for no case has determined, that the word "when," as referred to a period of life, standing by itself, and unqualified by any words or circumstances, has been ever held to denote merely the time, at which it is to take effect in possession; but standing so unqualified and uncontrolled it is a word of condition: denoting the time, when the gift is to take effect in substance. That this is so, is evident upon mere general principles; for it is just the same, speaking of an uncertain event, whether you say "when" or "if" it shall happen. Until it happens, that, which is grounded upon it, cannot take place. In the civil law, the words "*cum*" and "*si*," as referred to this subject, are precisely equivalent; and from that law we borrow all, or at least the greatest part, of our rules upon legacies; and particularly the rule upon the subject immediately under consideration in that case, with reference to the words, by which a testator denotes his intention as to the gift taking effect, or taking effect in possession. In the Digest it is thus laid down: —

"Si Titio, cum is annorum quatuordecim esset factus, legatus fuerit, et is ante quatuordecimum annum decesserit, verum est, ad heredem ejus legatum non transire: quoniam non solum diem, sed et conditionem hoc legatum in se continet; si effectus esset annorum quatuordecim. Qui autem in rerum natura non esset, annorum quatuordecim non esse non intellegeretur. Nec interest utrum scribatur, si annorum quatuordecim factus erit, an ita: cum priore scriptura per conditionem tempus demonstratur; sequenti per tempus conditio: utrobique tamen eadem conditio est."

It is very true: the word "when," not so standing by itself, but coupled with other expressions or circumstances, that have a reference to the time, at which the possession of the thing is to take place, has been held by the civil law not to have so absolute a sense that it cannot possibly be controlled. Another passage in the Digest is thus expressed: —

"Scius Saturninus Archigubernus ex classe Britanica testamento fiduciarium reliquit heredem Valerium Maximum trierarchum: a quo petiit ut filio suo Scio Oceano, cum ad annos sedecim pervenisset, hereditatem restitueret. Scius Oceanus, antequam impleret annos, defunctus est."

Then it states, that a claim was made by the uncle of Scius, as next of kin, which was resisted by the fiduciary heir, who contended, that,

as Scius had not lived to the age of sixteen, it was not vested. The opinion is this: —

"Si Scius Oceanus, cui fideicommissa hereditas ex testamento Seii Saturnini, cum annos sedecim haberet, a Valerio Maximo fiduciario herede restitui debet, priusquam præfinitum tempus ætatis impleret, decessit: fiduciaria hereditas ad eum pertinet, ad quem cætera bona Oceani pertinuerint: quoniam dies fideicommissi vivo Oceano cessit: scilicet si prorogando tempus solutionis, tutelam magis heredi fiduciario permisisse, quam incertum diem fideicommissi constituisse, videatur."

This distinction was transferred from the civil law to ours; at least so far clearly as regards pecuniary legacies. In the case cited, *Stapleton* v. *Cheales*, Pre. Ch. 317, it was clearly held, that the expressions "at twenty-one," or "if," or "when," he shall attain twenty-one, were all one and the same; and in each of those cases if the legatee died before that time, the legacy lapsed. I do not find any case, in which this position has been ever contradicted. In *Fonnereau* v. *Fonnereau*, 3 Atk. 645, it was clear, if it had stood upon the first part of that bequest, it would have been held not vested. Lord Hardwicke rests entirely upon the subsequent words, as controlling the word "when;" as it would have operated, standing alone. That will sets out precisely as this does; but when it went on with words, making the intention clear, giving interest for his education, with a power to the trustees to lay out any part of the principal to put him out apprentice, and the remainder to be paid to him, when he should attain the age of twenty-five, it was clear, upon the whole, nothing but the payment was postponed.

A distinction has been introduced between the effect of giving a legacy at twenty-one and a legacy payable at twenty-one. That is also borrowed from the civil law. The Code thus states it: —

"Ex his verbis, do lego Æliæ Severinæ filiæ meæ et Secundæ decem: quæ legata accipere debebit, cum ad legitimum statum pervenerit: non conditio fideicommisso vel legato inserta: sed petitio in tempus legitimæ ætatis dilata videtur:"

For there the words were, that the time of payment was to be at her legitimate age: —

"Et ideo si Ælia Severina filia testatoris, cui legatum relictum est, die legati cedente, via functa est: ad heredem suum actionem transmisit; scilicet ut eo tempore solutio fiat, quo Severina, si rebus humanis subtracta non fuisset, vicessimum quintum annum ætatis implesset."

This distinction however has been held by some equity judges altogether without foundation; and by others it has been treated as too refined. Lord Keeper Wright, in *Yates* v. *Fettiplace*, Pre. Ch. 140, alluding to the distinction in Godolphin and Swinburne from the civil law, declared it altogether without foundation. Lord Cowper acknowledged, that it was at least a refinement; but he thought, it was now well established. Lord Hardwicke likewise said, it was originally a refinement. But in what did that refinement consist? It was not in holding, that it should

not vest before the age of twenty-one, but in holding, that it should vest, though the party should not attain that age: their opinion being that it should not vest. Then why should we refine upon a refinement by deviating still more, and holding arbitrarily, that the word "when" standing by itself does not import condition; I say, that standing by itself it does import condition; and it requires other words to show, it was meant to defer payment. But according to the report of the judgment in *May* v. *Wood*, it is quite the reverse; that standing alone it imports delay of payment; and other words are necessary to show a condition. That is a distinction upon a distinction; which original distinction has by several great judges been held to have been originally a refinement. The only cases alluded to in *May* v. *Wood* are cases of real estate; beginning with *Boraston's Case*, 3 Co. 16; and ending with *Doe* v. *Lea*, 3 Term Rep. B. R. 41. The principle of them all is stated by Lord Mansfield in *Goodtitle* v. *Whitby*, 1 Bur. 228, in a way that renders them perfectly consistent with the opinion I entertain as to the word "when," standing by itself, unqualified and uncontrolled. Lord Mansfield there lays down these rules of construction: —

"1st, wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property:"

"2dly, where an absolute property is given, and a particular interest in the mean time, as until the devisee shall come of age, &c., and when he shall come of age, &c., then to him &c., the rule is, that that shall not operate as a condition precedent, but as a description of the time, when the remainder-man is to take in possession."[1]

There could be no doubt of the intention there. Everything was given to the trustees for the benefit of the infant. He was entitled ultimately to have the whole. The reason of giving to the trustees in the mean time evidently was, that he was not intended to have the possession and management until the age of twenty-one.

Upon exactly the same ground was *Boraston's Case*. It was not alleged in that case, that these were not words of contingency taken by themselves: but it was said, you must model these unapt words: so as to get at the intention from the whole will. The evident intention was to defer payment for a particular purpose; as if he had calculated, how many years it would take to pay off his debts, and in how many years Hugh Boraston would attain the age of twenty-one; and if given to the executors, with remainder to him at twenty-one, it would be clear vested remainder. The court approves that argument of the counsel; but does not say, that "when," standing by itself, would not have made a condition. So, in *Manfield* v. *Dugard*, 1 Eq. Ca. Ab. 195, it was clear, the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit of the wife: but he clearly meant a vested remainder, not contingent, whether the son should take

[1] These rules are applied to pecuniary legacies, *Lane* v. *Goudge*, 9 Ves. 225 (1803); *Packham* v. *Gregory*, 4 Hare, 396 (1845).

any benefit at all in the estate. But that makes a very different question from this; whether, where there is no precedent estate, no purpose whatsoever, for which the enjoyment was to be postponed, you shall say, the enjoyment only is to be postponed. So in *Doe* v. *Lea* the devisee was intended to have the whole benefit: but trustees were interposed, to keep the management of the estate, until he should attain the age of twenty-four; with a charge out of the rents and profits to keep the buildings in repair. There was a reason for postponing the possession; and it was evident, nothing but the enjoyment was intended to be postponed. It was not a bare devise to him, when he should attain twenty-four.

If those cases therefore had occurred as to pecuniary legacies, there is no ground to say, the decision ought to have been different; for from the very same circumstances and expressions it might be collected, that the word "when" was used, not as a condition, but merely to postpone the enjoyment; the possession in the mean time being disposed of in another way. It is impossible, that Lord Mansfield, and there is nothing in his judgment indicating it, could have considered the word "when" standing by itself, as other than a word of condition. It is impossible; for only two days before, in *Gross* v. *Nelson*, 1 Bur. 226, having occasion to speak of legacies, upon a note of hand, which he compared to the case of a legacy, he says, "but if the time is annexed to the substance of the gift, as a legacy, if, or when, he shall attain twenty-one, it will not vest, before that contingency happens." He considered "when" precisely the same as "if."

Love v. *L'Estrange*, 3 Bro. P. C. 337, seems to have been considered a strong authority for holding "when" to operate conditionally. The late Lord Chancellor was so strongly impressed with the idea he had thrown out at an early period in *Monkhouse* v. *Holme*, 1 Bro. C. C. 298, that he found it difficult to account for it otherwise than upon the distinction as to a residue; which the late Master of the Rolls in *Booth* v. *Booth* acknowledged there might be. But it was not necessary to resort to that; for *Love* v. *L'Estrange* may be warranted upon the principles laid down in *Goodtitle* v. *Whitby*. It was not a simple, unqualified gift; but there were many circumstances to show, that Walter Nash was meant to have the benefit absolutely; and that the enjoyment only was postponed; the testator giving it to trustees in the mean time; and applying a reason for withholding the enjoyment from this minor; that he wished him to follow his trade as a journeyman; with which object he naturally thought that fortune would interfere; and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of Walter Nash; to improve it for his benefit; to transfer the whole to him, when he arrives at that age: and to make him a certain allowance in the mean time. That is very different from a simple bequest to him, when twenty-four; for if that had been a legacy, it would have been separated from the residue immediately upon the testator's death; and must

have been paid over to the trustees immediately: and they would have managed it, until the legatee had attained the age of twenty-four.[1]

Upon the whole view of the cases, and taking the reason of the doctrine and the origin of it into consideration, there is no ground whatsoever for the generality of the proposition, which the Master of the Rolls is represented to have laid down in *May* v. *Wood*. To that proposition the following words are added: —

"And not, where he has merely used the word 'when' for the sole purpose of postponing the time of payment."

If the Master of the Rolls meant so to qualify his former proposition, that I admit; and have no difficulty in agreeing to it. But it is evident, that this is inaccurately taken; for the two parts of the proposition do not accord. First, it is laid down generally, "that it requires words to show, 'when' does operate conditionally:" in the latter part it is stated, that if it appears, "when" is used only for postponing payment, it shall not operate farther. Nothing can be clearer than that.

In this cause therefore I should have determined against the plaintiffs; if it stood merely upon the first words. But then it is contended, that they are entitled; because interest is given; and that they come within an established rule of the court; that though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory; and denoting, that the testator meant the whole legacy to belong to the legatee. On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true, it has been held, that has not the same effect as giving interest; upon this principle; that nothing more than a maintenance can be called for; what can be shown to be necessary for maintenance: however large the interest may be; and therefore what is not taken out of the fund for maintenance must follow the fate of the principal; whatever that may be. But by this will it is clear, the whole interest is given. Can there be any doubt, that in this case all the interest became, as it fell due, the absolute property of these infants, as separated altogether from the residue? All, that is left to the trustees, is to determine, in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely, separated from the principal. It is therefore the simple case of interest. It was observed for the defendants, that here is not only the period of the age, but also marriage with consent; and it was asked, supposing any of them had married without the consent of the executors, was it to vest? That is just the same question. If it is shifted to the question, whether it is to be paid, if any of them married without consent, the executors might say, no: the period of payment had not arrived. But marriage with consent is not a condition precedent;

[1] See *Saunders* v. *Vautier*, Cr. & Ph. 240, 248 (1841); *Dundas* v. *Wolfe Murray*, 1 H. & M. 425 (1863).

for at the age of twenty-one, whether married with consent or not, they would be entitled. That therefore, not operating as a condition precedent, does not make any material distinction. The legacy is accompanied with an absolute gift of the interest; which according to the established rule has the effect of vesting it. I am therefore of opinion, that the plaintiffs are entitled.

WATSON *v.* HAYES.

CHANCERY. 1839.

[*Reported* 5 *Myl. & Cr.* 125.]

LORD COTTENHAM, C.[1] As to the £500 legacy to his natural daughter, the decree has declared it to be a vested legacy in such daughter from the time of the testator's death, and that interest is to be paid thereon at the rate of £4 per cent from her death, she having died at the age of eight years.

The directions in the will are, after devising his estate to trustees, that all his other estates of what nature or kind soever, and wheresoever situate, be sold, and the money arising from the sale thereof be vested in real or government securities, to be disposed of as follows: that his executors should pay £25 per annum for the maintenance and education of his natural daughter Sophia, till she should attain twenty-one or be married, "*when* my said executors are hereby required to pay to Sophia the clear sum of £500 to and for her own sole use and benefit." It does not appear from so much of the report as is set out in the petition of appeal, whether this £500 is to be considered as payable out of the personal or real estate; but, as most favorable to the vesting, I will suppose, that there was personalty sufficient for that purpose; and in order to try the question of vesting, I will first consider the gift of the £500 independently of the gift of £25 per annum for maintenance, and secondly, how far that provision affects the question of vesting.

There is no gift of the £500, except in the direction to the executors to pay that sum to the daughter, when she shall attain twenty-one or be married. Here is the word "when" distinctly applied to the gift itself, and not to the time of payment, to which Sir W. Grant's judgment in *Hanson* v. *Graham*, 6 Ves. 239, is therefore directly applicable; and there is also the absence of any terms of gift, except in the direction to pay at a given time which never arrived, or upon a given event which never took place, to which Sir W. Grant's observations in *Leake* v. *Robinson*, 2 Mer. 363, directly apply, and which doctrine has been frequently recognized as a settled rule.

[1] A part of the opinion only is here given.

This case appears to me to come so clearly within those rules, that I cannot think that any doubt would have been entertained as to this legacy having failed by the death of the legatee in infancy, if the question had not been supposed to be affected by the gift of the £25 per annum, for its maintenance and education.

It is well known, that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the mean time, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle, that it is the gift of the whole interest which effects the vesting of the legacy. Such was the opinion of Sir W. Grant in *Hanson* v. *Graham* and *Leake* v. *Robinson*, and recognized by Sir J. Leach in *Vawdry* v. *Geddes*, 1 Russ. & Mylne, 203. It is, therefore, the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise, whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy.

In this case, £25 per annum, out of the proceeds of the real and personal estate, after investment in real or government securities, is directed to be paid quarterly for the maintenance and education of the daughter till twenty-one or marriage, when the £500 is to be paid. That the testator fixed upon the sum of £25 per annum as interest at £5 per cent upon £500 is probable, but it is clearly not given as interest upon that sum. The gifts are perfectly distinct, and the title to the £25 per annum could not be affected by the interest upon £500 not amounting to £25. In *Batsford* v. *Kebbell*, 3 Ves. 363, Lord Rosslyn, there being no gift, except in the direction to pay at a certain age, held the legacy not vested before that time, although the legacy was of £500 £3 per cents, and there was a direction to pay the dividends upon £500 £3 per cents to the legatee, until he should attain the age at which the stock was to be transferred to him. That case necessarily includes and governs that now before me.

I am, therefore, of opinion, that this gift of £25 per annum cannot be considered as interest upon the £500 so as to effect the vesting of the legacy, and consequently, that even supposing the legacy to have been payable out of the personal estate, it failed by the death of the legatee under twenty-one and unmarried; but if, as seems probable from the language of the will, the legacy, if payable, would have been to be raised out of the real estate, no ground would remain upon which any argument could be rested in favor of the vesting.

The decree of the Vice-Chancellor must, therefore, be varied, by declaring that this legacy of £500 lapsed by the death of the legatee under twenty-one and unmarried.

PARKER *v.* SOWERBY.

CHANCERY. 1853.

[*Reported* 1 *Drew.* 488.]

THIS cause came on on further directions.[1] The testator was seised of real estate, and possessed of personal estate, and he made his will, dated Aug. 15, 1833, which, so far as is material, was as follows:

I constitute and appoint my wife, Sarah Monkhouse, sole executrix of this my last will and testament. I bequeath unto her all my personal property, whatsoever or wheresoever, to her own use entirely; and all rents, or arrears of rent due to me at the time of my death, I give unto her to pay all my small debts, testamentary and funeral expenses. I give and bequeath unto John Pollock, son of Thomas Pollock, of Shields, my nephew and heir-at-law, all my estate at Low Braithwaite, in the parish of Hesket, and county of Cumberland, he paying unto my wife £40 a year from the said estate during her natural life; and I do also hereby nominate and appoint Joseph Sowerby, of Carlisle, gentleman, John Simpson, of Beacon Hill, husbandman, and William Scott, of Micklethwaite, farmer, joint trustees, under this my last will and testament, unto whom I give full power to act in conformity to this my said will. All my estate at Sowerby Row, in the parish of Castle Sowerby, and my estate at Longlands, in the parish of St. Mary Without, I give into the hands of my trustees, to have power to let the same till all my nephews and nieces be of the age of twenty-one years. I give and bequeath unto my sister Margaret Parker £10 a year to be paid her in addition to the 4*s.* a week left her by my father Isaac Monkhouse, during her natural life, the other part of the rents to pay my just debts, should any bonds or notes stand against me at the time of my death; then, after the youngest of my nephews and nieces is of age, then my will is, that the estates be sold by my trustees to the best advantage, and the price thereof to go equal, share and share alike, amongst all my nephews and nieces, Joseph Parker and John Pollock excepted; should Margaret Parker be living, then my trustees to secure her £20 a year during her life, and after her decease to be divided as above; my trustees to take to themselves reasonable expenses for their trouble; no wood to be cut or sold but what may be wanted for necessary repairs of the buildings, which I leave to the discretion of my trustees; if my wife should have a child or children by me, born after my decease, this will is of no effect, as such child will be heir to all I have, and if more than one, share and share alike.

The testator died in 1837, and his will was duly proved by his widow. She died in 1847.

[1] A part of the case, relating to the widow's rights, is omitted.

The plaintiffs were Elizabeth Parker, who was the youngest of the testator's nephews and nieces, and attained her age of twenty-one in 1849, and other nephews and nieces or those claiming under them.

The bill was filed against the trustees, making others of the nephews and nieces defendants, for administration of the testator's estate.

The point raised in the case, was between nephews and nieces who had attained twenty-one, and were living at the time when the youngest attained twenty-one, and the representatives of nephews and nieces who had died under twenty-one, before that period, or having attained twenty-one, had died before that period; the question was whether the latter took vested interests.

Mr. Bovill, *Mr. Taylor*, *Mr. Bagshawe*, *Mr. Glasse*, *Mr. Murray*, and *Mr. Fleming*, for parties in different interests.

The Vice-Chancellor. [Sir R. T. Kindersley.] Assuming that both of the nephews and nieces who died before the period of sale attained twenty-one, I am of opinion that they are not excluded. This is a gift of real estate; it is given to trustees in fee, and they are to have power to let till *all* the nephews and nieces of the testator shall have attained twenty-one. The testator is there speaking of all the nephews and nieces whom he should have at the time of his death. He gives to Martha Parker £10 a year to be paid out of the rents, and the other part of the rents he directs to be applied in payment of his debts. Then after the youngest of his nephews and nieces shall have attained twenty one, he directs his estates to be sold, &c. (The Vice-Chancellor referred to the particular language of the will.) And then he directs, that if M. Parker should be living, she should have £20 a year. Now if this were a limitation of the estate to the nephews and nieces, it appears to me it would be a vested interest in them, notwithstanding dying before the period fixed for sale and distribution; and it appears to me that the testator has only directed a sale, for the convenience of division.

Besides, I think there is this further reason for coming to this conclusion, viz.: that the testator, by excluding two of his nephews and nieces by name, shows himself, that except those two, he intended all his nephews and nieces to take. No doubt if a bequest is in these terms: "I desire that after a certain period my estate shall be sold," &c., the postponement not being for the convenience of the estate, the legatee must survive the period if he is to take. But if the postponement is for working out the purposes of the testator with reference to the estate, the interest will vest immediately.

I am of opinion that upon the authorities generally, this is a vested interest in the nephews and nieces who attained twenty-one, whether they did or did not survive the period at which the sale is directed. But if any of them did not attain twenty-one, such nephews and nieces did not (on the authority of *Leeming* v. *Sherratt* [2 Hare, 14]), take any interest.

[1] See *In re Smith's Will*, 20 Beav. 197 (1855).

LLOYD *v.* LLOYD.

CHANCERY. 1856.

[*Reported* 3 *K.* & *J.* 20.]

THOMAS ROBINSON, by his will, dated in 1808, gave and devised his freehold messuage, tenement, or dwelling-house, with the hereditaments and appurtenances thereunto belonging, situate in Bull Street, in Birmingham, to Samuel Lloyd and William Shorthouse, and their heirs, upon trust, that they, and the survivor of them, and his heirs, should pay to, or permit the testator's daughter Sarah Enoch, since deceased, wife of Robert Enoch, since deceased, and her assigns, to receive and take the rents and profits thereof for her life, for her separate use; and, after her decease, upon trust, that they the said trustees, or the survivor of them, and his heirs, should apply the rents, issues, and profits of the said premises for and towards the maintenance, education, and benefit of all and every the child and children of his said daughter Sarah Enoch, during their minority, and when and as soon as all such children, if more than one, should have attained the age of twenty-one years, upon trust to sell and dispose of the said last-mentioned messuage or dwelling-house and premises, if it should be thought right, for the most money and the best price that could or might be had or gotten for the same; and the money arising therefrom to pay and apply to and amongst all and every such child or children, share and share alike if more than one, and if but one, then the whole thereof to such only child, for his, her, or their respective use and benefit, and as his or their own proper moneys absolutely.

There was no gift over.

Thomas Robinson died in 1809; Robert Enoch, the husband of the said Sarah Enoch, died in March, 1817; Sarah Enoch died in October, 1853, having had issue seven children, and no more; all of whom, with the exception of two, named respectively Arthur Enoch and Arthur Gregory Enoch, lived to attain their respective ages of twenty-one years; the said Arthur Enoch and Arthur Gregory Enoch, respectively, died after the decease of the said Thomas Robinson the testator, but under the age of twenty-one years.

A special case was now presented stating these facts.

The question for the opinion of the court was, whether, according to the true construction of the will of the said testator Thomas Robinson, the plaintiff, as the legal personal representative of the said Arthur Enoch, deceased, and Arthur Gregory Enoch, deceased, respectively, took any and what shares and interests of or in the proceeds to arise from the sale of the said messuage and premises in Bull Street, Birmingham; and how and in what shares such proceeds were distributable under the said will.

Mr. Rolt, Q. C., and *Mr. Cole*, for the plaintiff, the representative of the two deceased children.

Mr. Cairns, Q. C., and *Mr. Hedge*, for children who had attained twenty-one.

Mr. Taylor, for parties in the same interest, and for the testator's heirs.

Vice-Chancellor Sir W. Page Wood (after stating the words of the will, and the facts of the case, to the effect above given, continued as follows) : —

The question is, whether the two children who died under twenty-one are excluded from the benefit of this gift. As regards the grammatical construction, it reads as though the direction had been to pay and apply the rents and profits for the benefit of all the children during their minorities, and until all have attained twenty-one, and then to pay and apply the capital amongst all the children. I think the word "such" in this will, would strictly apply to a gift of that description. But, according to the decision in *Parker* v. *Sowerby*, 1 Drew. 488, the real question is, whether, in a will framed in this shape, it is intended that children who die under twenty-one should acquire any vested interest in the property. I referred, during the argument, to an authority which seemed to justify that claim: *Jones* v. *Mackilwain*, 1 Russ. 220; but there the limitation of the rents and profits was to each of the children respectively, and then there was a gift to them of the capital at twenty-one; and, therefore, that case was brought within the principle of *Hanson* v. *Graham*, 6 Ves. 239, and children who died under twenty-one were held entitled to take.

Looking narrowly at the form of the instrument here, it is plain that no such question arises. The rents and profits are to be applied for the maintenance of all the children "during their minority." No doubt the testator contemplated, that all the children would live to attain twenty-one; and I must consider what is the true intent of the gift, all the circumstances of the case and the expressions of the will being regarded. With respect to the direction for the application of the rents and profits until all attained twenty-one — whatever might be the case if one only attained twenty-one, while others were under that age, whether it might then be possible to extend the meaning of the words, as was done in *Davies* v. *Fisher*, 5 Beav. 201 — it is plain to my mind, that the testator never intended that those children who died under twenty-one should have such an interest that their executors should receive their shares of the rents until all the children should have attained twenty-one. There are no words to carry such a gift, and nothing can be conceived further from the intention. This view of the case takes it out of the rule in *Hanson* v. *Graham*, that shares are vested when all the intermediate interest and profits are given to the legatees.

The question remains, whether there is not a good gift to all the children, when all attain twenty-one. It is important to observe the inten-

tion. According to *Parker* v. *Sowerby*, and a dictum in *Leeming* v. *Sherratt*, 2 Hare, 23, where there is a gift of this kind, the testator intends that the parties who are to take should be those who at the time are found in the enjoyment of the rents and profits — those for whom he has provided until the period of distribution. It is inconsistent to suppose that he provides for one class until that period, and then for another. The gift must be read as though the testator had said, "I intend this for the benefit of all those children who do in fact attain twenty-one. I postpone the division until all attain twenty-one; and I give the rents and profits to them for their maintenance, during their respective minorities; and the distribution is to be among those who shall be receiving the rents and profits when the youngest child attains twenty-one."

Therefore, the two children who have died under twenty-one took no share.[1]

IN RE HART'S TRUSTS.

CHANCERY. 1858.

[*Reported* 3 *De G. & J.* 195.]

THIS was an appeal from the decision of *Vice-Chancellor Stuart*, upon a petition presented under the Acts for the Relief of Trustees.

The question was as to the construction of the will of William Hart, dated the 13th of November, 1849, whereby, after appointing Jonathan Abbott and James Osborne executors, the testator gave and devised unto his mother Maria Hart all and singular his messuages, lands, tenements and hereditaments, with their rights, members and appurtenances, to hold the same to her and her assigns for her life; and from and immediately after the decease of his mother he gave and devised all such parts as were freehold or charterhold of and in the said messuages, lands, tenements and hereditaments, with their appurtenances, unto Jonathan Abbott and James Osborne, their heirs and assigns, upon trust that they, or the survivor of them, or the heirs, executors or administrators of such survivor, should, as soon as could conveniently be after her decease, absolutely sell and dispose of the same hereditaments and every part thereof; and as to such parts as were copyhold or of customary tenure of and in all and singular his said messuages, lands, tenements and hereditaments, he thereby authorized, empowered and directed his trustees and the survivor of them, and the executors or administrators of such survivor, in like manner as was mentioned with regard to the freehold parts of his hereditaments and premises, absolutely to sell and dispose of and to convey and assure the same freehold and copyhold hereditaments respectively, when sold, unto the purchaser or purchasers thereof, his, her or their heirs and assigns,

[1] But cf. *Re Grove's Trusts*, 3 Giff. 575 (1862).

or as he, she or they should direct; and he declared and directed that his trustees and the survivor of them, and the executors or administrators of such survivor, should stand possessed of the moneys to arise and be produced from the sale of his freehold and copyhold hereditaments, and the rents and profits thereof until sale, upon and for the trusts, intents and purposes thereinafter expressed and thereinafter mentioned concerning the same, that was to say, upon trust in the first place to pay the expenses of and attending such sale or sales, and in the next place to pay to his daughter Henrietta Ann the sum of £500 sterling when she should attain the age of twenty-five years; and he directed that the legacy should carry interest from the time of his mother's decease, which interest should be paid in and towards the maintenance, education and support of his said daughter until she should attain the age of twenty-five years; and also to pay or allow to James Osborne the sum of £100, and to Prince Fox the like sum of £100, which he gave and bequeathed to them respectively; and from and immediately after his said mother's decease, he also gave and bequeathed unto Jonathan Osborne and Prince Fox the several debts or sums of £200 owing to him from them respectively and secured by their respective promissory notes. And subject as aforesaid, the testator directed that the said trust moneys should remain and be in trust for all and every the children and child of his cousin, the widow of the late Ralph Johnson, who should be living at the decease of his mother, and be paid to them when and as they should severally and respectively attain the age of twenty-one years, in equal shares as tenants in common, the interest in the mean time to be applied for and towards their respective maintenance, education and support.

The testator died on the 14th of November, 1849.

The testator's daughter attained twenty-one in February, 1855, and married Mr. Block, the petitioner, on the 25th of October, 1855. She died in September, 1857, and letters of administration of her estate and effects were granted to the petitioner.

Maria Hart, the mother of the testator, died in 1850.

After the death of Maria Hart, Jonathan Abbott and James Osborne sold the testator's real estate as directed by the will, and out of the produce of the sale set apart and invested on mortgage £500 to answer the daughter's legacy. Afterwards, on the mortgage being paid off, in July, 1858, they paid the £500 into court, under the provisions of the Acts for the Relief of Trustees.

The petition under appeal was then presented by Mr. Block for payment of the £500 to him as the legal personal representative of his late wife. The respondents were children of Ralph Johnson, to whom the residue of the proceeds of the real estate was given by the will, and who submitted that, under the circumstances of the case, the legacy of £500 had lapsed by reason of the death of Mrs. Block under the age of twenty-five years. The Vice-Chancellor, taking that view of the case, ordered accordingly, and Mr. Block appealed.

Mr. Malins and *Mr. W. D. Evans*, in support of the appeal.

Mr. Bacon and *Mr. Southgate*, for the respondents.

Judgment reserved.

The Lord Justice Turner.[1] — I am also of opinion that this legacy became vested in Harriett Ann Block, although she died under the age of twenty-five years. The estate out of the proceeds of which the legacy is given is by the will, after the death of the mother, vested in trustees in trust to sell, and they are to stand possessed of the moneys to arise from the sale upon trust, &c. [His Lordship read the words.]

There is here, therefore, not merely a trust to pay the legacy when the legatee attains twenty-five, but a direction that the legacy is to carry interest, which is to be applied for the maintenance of the legatee. The gift is not of maintenance merely, but of the whole interest. The legatee therefore was in this position, she was to be paid the legacy when she attained twenty-five, and to take the interest in the mean time. Both the principal and the interest are appropriated to her.

But it was said that the gift of the interest is distinct from the gift of the principal, and it was sought upon this ground to bring the case within the authority of *Batsford* v. *Kebbell*, 3 Ves. 363, and *Watson* v. *Hayes*, 5 Myl. & Cr. 125. I think, however, that those cases do not govern the present. In the former of those cases, *Batsford* v. *Kebbell*, the direction was to pay the legatee the dividends until thirty-two, and at that time to transfer to him the principal; and the court, in holding the legacy to be vested, seems to have proceeded on the marked distinction which was drawn between the dividends and the capital, and in the latter of the cases, *Watson* v. *Hayes*, Lord Cottenham treats the gift of the £25 per annum as a gift, not of interest, but of maintenance only. In the present case the direction is that the legacy shall carry interest, annexing, as it seems to me, the interest to the legacy, and I do not see how we could hold this legacy not to be vested, unless we were prepared to hold that no legacy to be paid when a legatee attains a prescribed age, with interest in the mean time, vests until the legatee has attained the specific age, a conclusion which would be quite at variance with *Hanson* v. *Graham*, 6 Ves. 239, and many other decided cases.

Where a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age or a present gift with a postponed payment, and if the interest is given in the mean time, it shows that a present gift was intended.

A further point which was urged against the legatee in this case was, that the legacy ought to be considered as subject to the rules which apply to legacies upon land, and that according to those rules it could not be vested, and *Watson* v. *Hayes* was referred to upon this point

[1] The opinion of *Knight Bruce*, L. J., to the same effect, is omitted.

also; but I think that what fell from Lord Cottenham upon this subject in that case had reference merely to the general rules applicable to legacies charged upon land, and I have not met with any case in which it has been held that the rules as to vesting which apply to legacies charged on land are to be applied to legacies given out of moneys to arise from the sale of the land. The case of *Harrison* v. *Naylor*, 2 Cox, 247, certainly tends to the opposite conclusion, and I think that conclusion the better one, for the legacy is held by the trustees and paid to the legatee as money, and besides, the rule of the court is, to deal with property in the state in which it ought to be, and not in the state in which it is.

This order therefore must be discharged, and there must be an order for payment to the legatee.

IN RE ASHMORE'S TRUSTS.

CHANCERY. 1869.

[*Reported L. R.* 9 *Eq.* 99.]

PETITION.

Elizabeth Ashmore, widow, by her will dated the 14th of May, 1844, bequeathed all her residuary personal estate to trustees upon trust to assign and transfer a leasehold house as therein mentioned; and further upon trust, after the decease of her daughter, Mary Ann Hopkins, to assign, transfer, and pay £1000 (part of her said estate), or the investments thereof, and all other her moneys, estate, and effects, unto and equally between such of her four grandchildren, James Joseph Hopkins, George Thomas Hopkins, Elizabeth Hopkins, and Robert Hopkins, as should be living at the decease of her (testatrix's) said daughter, and as should then have attained or should thereafter live to attain the age of twenty-one years; and in the mean time to apply the dividends and annual proceeds of the share or shares of such of them as should be under the age of twenty-one years or so much thereof as might be necessary, in or towards his, her, or their maintenance and education.

Testatrix then continued as follows: —

"Provided, and my will is, that in case any of my said four grandchildren shall die in the lifetime of my said daughter leaving lawful issue them, him, or her surviving, the share or shares of such of them so dying shall be assigned and transferred to such issue respectively, in equal shares and proportions, on their attaining the age of twenty-one years, and the dividends and proceeds thereof in the mean time to be applied in or towards their maintenance and education."

Testatrix died on the 13th of November, 1850.

Mary Ann Hopkins, the daughter, died on the 31st of August, 1859. At that date one of the grandchildren, namely, Elizabeth Andrews, formerly Hopkins, was dead.

Elizabeth Andrews had had four children, namely, the petitioner, Edward, who was born on the 2d of July, 1848; Elizabeth, who was born on the 27th of February, 1850, and who died in 1851; Mary Ann, who was born in 1851; and Emma, who was born in 1852.

Since the death of Mary Ann Hopkins, Mary Ann and Emma Andrews had both died infants, leaving the petitioner Edward Andrews the sole survivor of the issue of Elizabeth Andrews.

The petitioner attained twenty-one on the 2d of July, 1869; and the question now between him and his father, who had taken out administration to the infants, or some of them, was, whether the interests of the infants in their mother's share vested at the death of their mother, or whether such share vested in the only one of the issue who lived to attain twenty-one.

The surviving trustee of the will having paid Mrs. Andrews' fourth share into court, the petitioner now prayed that it might be paid out to his solicitor.

Mr. Hardy, Q. C., and *Mr. Byrne*, for the petitioner.

Mr. Everitt, for the respondent, the administrator of the infants.

Sir W. M. James, V. C. I think, on the whole, I cannot distinguish this case from *Pulsford* v. *Hunter*, 3 Bro. C. C. 416. My first impression was the other way, but *Pulsford* v. *Hunter* seems to me to be exactly the same case, with a slight alteration of the order of the words.

In *Pulsford* v. *Hunter* a testator, after giving two annuities, enumerated some sums of stock then in his possession, and proceeded as follows: "the interest of the remainder part to be applied for the use and education of my grandchildren till they arrive at the age of twenty-one years, and the principal to be then equally divided amongst them;" and the Lord Chancellor (Lord Loughborough) thought that however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest.

In this case the fund is given to the issue on their attaining twenty-one, and the dividends and proceeds in the mean time are to be applied in or towards their maintenance and education.

I am really not able substantially to distinguish these two cases.

I think it very probable that the decision may be sustained by another consideration, — namely, that this is a gift not of a separate share to each of the issue on attaining twenty-one, with a gift of the dividends and proceeds thereof in the mean time to be applied in maintenance; but a gift of a fund to each of the issue on attaining twenty-one in equal shares and proportions, and a gift of the dividends and interest in the mean time.

In this respect the case is exactly that of *Pulsford* v. *Hunter*. That authority has never been questioned, and certainly never overruled.

There will be a declaration to the effect that the interests of those of the issue who died under twenty-one passed to the survivors.

FOX *v.* FOX.

CHANCERY. 1875.

[*Reported L. R.* 19 *Eq.* 286.]

SPECIAL CASE.

Thomas Were Fox the elder, by his will, dated the 9th of August, 1859, gave, devised, and bequeathed unto William Fox, Mark Stephens Grigg, John Williams, and Thomas Were Fox, the son, and Henry Fox, his real and personal estate not thereby specifically disposed of, subject to the pecuniary legacies and annuity thereby bequeathed, and to the payment of his debts, funeral and testamentary expenses, upon trust, in the first place, to raise thereout and set apart therefrom the sum of £15,000, and to invest the same sum in their names as therein mentioned, and to pay the income of the said sum of £15,000 so invested as aforesaid to his wife half-yearly during her life, and after her decease to pay the income of one equal fifth part of the said sum of £15,000 so invested as aforesaid to Thomas Were Fox, the son, half-yearly during his life, and after his decease to pay the said income thereof half-yearly to his widow, if he should leave a widow, during her widowhood; but if he should not leave a widow, or if he should, then, so soon as she should marry again or die, to divide and transfer the said equal one-fifth part of the said principal sum of £15,000 to and amongst the children of the said Thomas Were Fox, the son, equally as and when they should respectively attain the age of twenty-five years; but if he should have but one child, then to transfer the whole of the said one-fifth part to such only child, applying from time to time the income of the presumptive share of each child (if more than one), or the income of the whole if an only child, or so much thereof respectively as the trustees or trustee for the time being might think proper, to and for his and her maintenance and education until such share or entirety, as the case might be, should become payable as aforesaid; but if the said Thomas Were Fox, the son, should leave no children or child him surviving, or if he should and they should all die before attaining the age of twenty-five years, then to pay and transfer the said fifth part to the testator's son, the said Henry Fox, if then living, or if dead, to his children equally amongst them (if more than one) on attaining the age of twenty-five years respectively.

The testator died in February, 1860, and his widow in July, 1862.

Thomas Were Fox, the son, died on the 4th of July, 1870, leaving a widow and nine children, of whom the eldest was born on the 1st of May, 1854.

The widow of Thomas Were Fox, the son, married a second time in August, 1873.

The question was, whether the gift of one fifth of the sum of £15,000 by the will of Thomas Were Fox, the elder, to the children of Thomas Were Fox, the son, was valid.

Mr. Bagshawe, Q. C., and *Mr. Ferrers*, for the plaintiffs.

Mr. Chute, for the defendants.

Sir G. Jessel, M. R. The first question is, whether a gift contained in a direction to pay to legatees on attaining a certain age, followed by a gift of the interest for maintenance, is vested?

In the case of *In re Ashmore's Trusts*, Law Rep. 9 Eq. 99, Lord Justice James, when Vice-Chancellor, held that a similar gift was not vested. He admitted that his first impression was the other way, but he decided as he did on the authority of an old case, *Pulsford* v. *Hunter*, 3 Bro. C. C. 416. I cannot help thinking there is some mistake in the report of *Pulsford* v. *Hunter*. The observations in the judgment, as reported, seem to me to point, not to a gift of the interest for maintenance, but to a gift of maintenance out of the interest, which is not in accordance with the terms of the will as given in the report. However that may be, it seems to me that the law is clearly laid down in subsequent authorities.

In *Watson* v. *Hayes*, 5 My. & Cr. 125, 133, Lord Cottenham says: "It is well known that a legacy which would, upon the terms of the gift, be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the mean time, whether direct or in the form of maintenance, provided it be of the whole interest; which clearly marks the principle that it is the gift of the whole interest which effects the vesting of the legacy. . . . It is therefore the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy."

If that be the law, it is very difficult to support the decision in *In re Ashmore's Trusts*. What the Vice-Chancellor said was this: — [His Honor read the judgment].

I agree that *In re Ashmore's Trusts* is not to be distinguished from *Pulsford* v. *Hunter* as regards the terms of the will, but I do not find that Lord Loughborough said that giving the whole of the income for maintenance was not equivalent to giving interest. The report says that "the Lord Chancellor thought that, however it might be where interest was given, yet that the giving maintenance was a different case, and was not equivalent to giving interest." These observations, if correctly reported (which I doubt), seem to me to point to the distinction taken by Lord Cottenham between a gift of interest to be applied in maintenance and a gift of maintenance apart from interest; but if this be not the true meaning of them, then I think they are overruled by what Lord Cottenham said and by the current of modern authorities. Indeed, I cannot think that *Watson* v. *Hayes* and the subse-

quent cases were called to the Vice-Chancellor's attention; if they had, I feel sure he would willingly and cheerfully have followed them.

One of these cases is that of *Re Hart's Trusts*, 3 De G. & J. 195, 200, 202, before the Appeal Court. There the testator gave real estate to a devisee for life, with remainder to trustees in fee, in trust to sell and out of the proceeds to pay a legacy of £500 when the legatee should attain twenty-five, and he directed that the legacy should carry interest from the death of the tenant for life, to be paid towards the legatee's maintenance until she attained twenty-five. The legatee survived the tenant for life, but died under twenty-five; and it was held that the legacy was vested. Lord Justice Knight Bruce says that the legatee, "if the gift in question had been a legacy out of the testator's personal estate merely, would, in my opinion, upon principle equally and authority, have acquired a vested right to the £500 for her absolute use, either on the testator's death (subject to his mother's life estate) or on the death of his mother. For by the will interest was made payable on the £500 from the time of the death of the testator's mother, and that interest was directed to be applied wholly for the benefit of" the legatee. Lord Justice Turner adverts to the distinction taken by Lord Cottenham in *Watson* v. *Hayes*, and says: "In the present case the direction is, that the legacy shall carry interest, annexing, as it seems to me, the interest to the legacy; and I do not see how we could hold this legacy not to be vested, unless we were prepared to hold that no legacy to be paid when a legatee attains a prescribed age, with interest in the mean time, vests until the legatee has attained the specific age, a conclusion which would be quite at variance with *Hanson* v. *Graham*, 6 Ves. 239, and many other decided cases." Both the Lords Justices take the same view, which appears to me to be quite at variance with what was decided in *Pulsford* v. *Hunter*.

The Vice-Chancellor, in the case of *In re Ashmore's Trusts*, appears to have thrown out the suggestion that there might be a distinction between a gift of a separate share to each of the children on attaining twenty-one, with a gift of the income in the mean time for maintenance, and a gift of a fund to each of the children on attaining twenty-one, in equal shares, with a gift of interest in the mean time. I can find no such distinction taken in any other case, and it seems to me to be much too fine to be relied on.

There still remains the difficulty that the gift here is not a gift of the whole income absolutely for maintenance: there is a discretionary power to apply the whole income, or so much as the trustees may think proper, and the question is, whether that is a gift of the whole interest within the rule as laid down in *Watson* v. *Hayes* and the other cases I have referred to. On that point *Harrison* v. *Grimwood*, 12 Beav. 192, is a distinct authority. There the legacy was given to a class, followed by a direction, during the minority of the members of the class, to apply the interest, "or a competent portion thereof," for maintenance; and the court held the legacy was vested. Lord Langdale does not

appear to have considered the indication of intention derived from the direction to pay the whole income as affected by the words enabling the trustees to apply a competent portion for maintenance; he treated it as a gift of the whole income followed by a discretion to apply less than the whole income; and that appears to me to be a rational view.

Being opposed to the frittering away of general rules, and thinking that such rules, so long as they remain rules, ought to be followed, I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the mean time, is vested, and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose.

I also think that the gift over, if not conclusive on the question, certainly aids the construction adopted by me.

The answer to the special case must be that the gift is valid.[1]

IN RE PARKER.

Chancery Division. 1880.

[*Reported* 16 *Ch. D.* 44.]

Martha Elizabeth Parker, widow, who died in 1863, by her will, dated in 1856, gave her residuary real and personal estate to trustees in trust for sale and conversion, and to invest the proceeds upon the stocks, funds, and securities therein mentioned, and to stand possessed of the said stocks, funds, and securities, "upon trust to pay the dividends, interest, and income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in and towards the maintenance and education of my children until my said children shall attain their respective ages of 21 years; and from and immediately after their attaining their respective ages of twenty-one years, then upon trust to pay, assign, and transfer the said stocks, funds, and securities to my said children in equal shares, if more than one, and if but one, then to such one child; and as to each daughter's share, whether original or accruing, upon trust to settle the same," for the benefit of herself and her children. And the testatrix declared "that it shall be lawful for the trustees or trustee for the time being of this my will to assign, transfer, or dispose of any competent part, not exceeding one half of the presumptive share of any of my children for the preferment or advancing in life, or preparing for business, or on the marriage of any such child (being daughters) notwithstanding their minorities."

The testatrix had three children, two sons and a daughter, all of

[1] But cf. *In re Grimshaw's Trusts*, 11 Ch. D. 406 (1879); *Dewar* v. *Brooke*, 14 Ch. D. 529 (1880); *Re Martin*, 57 L. T. N. S. 471 (1887).

whom survived her. One of the sons died in 1873 an infant, leaving his brother and sister, who both attained twenty-one, his next of kin.

The daughter, Mrs. Barker, married in 1878, and in pursuance of the direction in the will a settlement was executed of her "moiety" of her mother's residuary estate.

The question was whether Mrs. Barker's moiety of surplus income of the infant's one third remaining unapplied by the trustees for his maintenance and education devolved upon her as one of his next of kin, or whether it was bound by her settlement; in other words, whether the infant's share was to be treated as "vested" or "contingent."

Woodroffe, for the plaintiff.

S. Roberts, for the defendants.

JESSEL, M. R. It appears to me that this case is different from that of *Fox* v. *Fox*, Law Rep. 19 Eq. 286. In my opinion, when a legacy is payable at a certain age, but is, in terms, contingent, the legacy becomes vested when there is a direction to pay the interest in the mean time to the person to whom the legacy is given; and not the less so when there is superadded a direction that the trustees "shall pay the whole or such part of the interest as they shall think fit." But I am not aware of any case where, the gift being of an entire fund payable to a class of persons equally on their attaining a certain age, a direction to apply the income of the whole fund in the mean time for their maintenance has been held to create a vested interest in a member of the class who does not attain that age.

The words here are plain. The trust is of residue: "to pay the dividends, interest, or income thereof, or such part thereof as my said trustees for the time being shall from time to time deem expedient, in or towards the maintenance and education of my children, until my said children shall attain their respective ages of twenty-one years;" so that there is nothing here giving an aliquot share of income to any individual child; the direction being to pay the income of the whole fund in such shares as the trustees shall think fit. I do not think you can infer anything from the direction for the settlement of the daughters' shares.

Then follows a gift of the whole fund to the children equally on attaining twenty-one. I should have felt no difficulty if it had not been for the advancement clause, which speaks of the "presumptive share of any of my children," but I do not think that clause is sufficient to alter the effect of the preceding part of the will.

That being so, I hold that the infant did not take a vested interest in his one-third share of the residue, and, accordingly, that Mrs. Barker's moiety of the unapplied income of that share is bound by the trusts of her settlement.

IN RE BUNN.

CHANCERY DIVISION. 1880.

[*Reported* 16 *Ch. D.* 47.]

JOHN CHARLES BUNN, who died in 1876, by his will, dated in 1873, bequeathed his residuary personal estate to his trustees and executors, in trust for conversion; and by a codicil dated in 1874, he declared that his trustees should hold his residuary personal estate upon trust to invest the same as therein mentioned, "and pay the annual income arising therefrom unto my nephew, Enoch Bunn, for his maintenance and until he shall attain the age of thirty years; and, upon his attaining that age, shall pay over or transfer the said trust-moneys and securities to the said Enoch Bunn for his absolute use and benefit."

The trustees paid the income of the testator's residuary estate to Enoch Bunn until his death in 1878, he being then in his twenty-second year.

The question in the action — which was for the administration of the testator's estate — was whether Enoch Bunn took a vested interest in the residue, or whether it went to the testator's next of kin.

Bagshawe, Q. C., and *Warlters Horne*, for the plaintiffs.

Roxburgh, Q. C., and *Romer*, for the defendants.

JESSEL, M. R. It appears to me that I am bound by the decision of the Court of Appeal in *In re Hart's Trusts*, 3 De G. & J. 195.

With reference to the case of *In re Parker*, 16 Ch. D. 44, it is the same as to this point as *Leake* v. *Robinson*, 2 Mer. 363. I do not wish to express any opinion of my own as to the effect of a gift coupled with a direction of this kind, because I consider I am bound by decision. The authorities are all collected in Mr. Theobald's book on Wills, page 276. He says, as the result of them, that a gift contingent upon attaining a given age may be vested "if the interest upon the legacy is given to the legatee in the mean time till the time of payment arrives." Then he says this is the case "though the interest may be expressed to be given for maintenance." That is *In re Hart's Trusts*, which covers this case completely: I cannot see any distinction. There the testator directed his trustees to pay £500 to his daughter when she should attain twenty-five, and that the legacy should carry interest to be paid towards her maintenance until she attained twenty-five. The daughter died under twenty-five, yet it was held that she took a vested interest in the legacy.

Then I notice that Mr. Theobald says — and it is quite right — "It makes no difference, whether the interest is first given up to a given time and then the principal, or *vice versa*, at any rate, if the age fixed is either twenty-one or some later age, but such as to indicate that the testator has fixed upon it only from the probable incapacity of the

legatees to manage their property satisfactorily earlier: " and as authority for that proposition he refers to five cases.

In the present case there is a direction to pay the income of the residue to the legatee for his maintenance until he attains the age of thirty; and, upon his attaining that age, to pay or transfer the capital to him. Whatever may be said about *Batsford* v. *Kebbell*, 3 Ves. 363, I am of opinion that I am clearly bound by *In re Hart's Trusts* to hold that this is sufficient to give a vested interest.

I therefore declare that the residuary estate became vested in Enoch Bunn.

FURNESS *v.* FOX.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1848.

[*Reported* 1 *Cush.* 134.]

WILLIAM FURNESS, of Medford, by his will dated March 2d, 1836, of which the plaintiff was the executor, provided as follows: —

" In the first place I give and bequeath to my grandson, John William Furness, son of my son John C. Furness deceased, five hundred dollars, if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor hereinafter named."

" All the rest residue and remainder of my estate both real and personal of every sort and description and wherever situated or being I give devise and bequeath to my children " (naming five persons) " their heirs and assigns forever to be equally divided between them."

On the 23d of May, 1842, the plaintiff, as the executor of William Furness, paid the legacy of five hundred dollars, to Charles Fox, the defendant, guardian of the legatee, John William Furness, who was then under age. At the same time, the defendant gave the plaintiff his receipt for the money in the following words: —

" Received of William Furness, executor of the last will and testament of William Furness, of Medford, deceased, five hundred dollars, said sum having been bequeathed by said William Furness deceased to his grandson John William Furness, to be paid to him, should he arrive at the age of twenty-one years. Charles Fox, guardian of said John William Furness."

Subsequent to this payment, the legatee, John William Furness, died, before arriving at the age of twenty-one years; and the plaintiff thereupon brought this action, in his capacity of executor, against the defendant, as the guardian of the legatee, to recover back the money so paid.

The cause was tried in the Court of Common Pleas, before *Washburn*, J., who ruled, that the legacy to John William Furness was contingent upon his arrival at the age of twenty-one years, and consequently lapsed by reason of his death, before arriving at that age.

The jury returned a verdict for the plaintiff, and the defendant filed exceptions.

J. Field, for the defendant.

S. E. Sewall, for the plaintiff.

METCALF, J. The sole question raised by these exceptions is, whether the legacy to the defendant's ward was vested or contingent. The testator's words were these: "I give and bequeath to my grandson, John W. Furness son of my son John C. Furness deceased five hundred dollars, if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor." The rule on this subject is plainly stated in many judicial opinions and elementary books, and the only difficulty is in a right application of it to particular cases. In 3 Wooddeson, 512, the rule is well expressed, as follows: "If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift, as a condition precedent, it is contingent, and not transmissible." See also Godolphin, Part III. *c.* 17, § 11; 1 Roper on Leg. *c.* 10, § 2. We have, therefore, only to inquire whether, in the case before us, the words, "if he shall arrive at the age of twenty-one years," relate to the words which precede, or to the words which follow them; or, in other language, whether the arrival of the legatee at the age of twenty-one years is a condition precedent to the gift of the money, or only to the payment of it into his hands. And we are of opinion that the testator meant to make an immediate bequest to the grandson, as the representative of his deceased father, but that the money should not go into his hands, during his minority. This seems to us to be the most natural construction of the mere words of the bequest, although the testator's meaning is obscured by the unfortunate collocation of those words, and the inartificial punctuation of the sentence. We are somewhat confirmed in this construction by the only other devising clause in the testator's will. After the bequest to his grandson, he gave all the residue and remainder of his property to his five children who were then alive, to be equally divided among them, without any limitation over, by express mention, of the five hundred dollars, in the event of his grandson's dying under age. It is true that this residuary clause would have passed to the five children the money bequeathed to the grandson, if the legacy to him had failed of effect; but it is hardly probable that the testator knew that such would be its legal operation.

The exceptions do not show who is entitled to the money in question, since the decease of the legatee; but they do show that the plaintiff, as executor, has no claim to it. *New trial ordered.*

NOTE. — See also *Davies* v. *Fisher*, 5 Beav. 201 (1842); *Re Baxter's Trusts*, 4 New Rep. 131 (1864).

On the question whether descendants take *per stirpes* or *per capita*, see Theob. Wills

(3d ed.) 237 ; 2 Jarm. Wills (4th ed.) 99–107 ; 2 Redf. Wills, 35 *et seqq.*; *Dexter* v. *Inches*, 147 Mass. 324 (1888).

Divesting of Interests. Some of the questions on the effect of divesting clauses have been considered in Chapter VI., *ante*, Executory Devises and Bequests. See also Theob. 445, 456. On Substitution of Gifts, see Theob. *c.* 37, pp. 457–465. On gifts over upon death before "payment of" or "actual receipt of" a legacy, see Theob. 482–487 ; on gifts over upon death unmarried and without issue, and on the change of "and" into "or," and *vice versa*, in gifts, see Id. 487–492 ; and on gifts over upon death without children, or without leaving or having issue, see Id. 492, 493.

Intermediate Income. Upon an executory devise of real estate intermediate rents go to the heir, *Hopkins* v. *Hopkins*, Cas. t. Talb. 44, 51 (1734) ; or residuary devisee, *Stephens* v. *Stephens*, Cas. t. Talb. 228, 233 (1736) ; and so if the executory devise be of the residue, the intermediate rents go to the heir. *Hodgson* v. *Bective*, 1 Hem. & M. 376 (1863) ; *Wade-Gery* v. *Handley*, 1 Ch. D. 653 ; 3 Ch. Div. 374 (1876). See Hawkins, Wills, App. 1, p. 315.

A legacy contingent or payable *in futuro* does not carry interest, *Heath* v. *Perry*, 3 Atk. 101 (1744).

Exceptions, I. A future legacy of the residue of personal estate carries the income, which accumulates. *Green* v. *Ekins*, 2 Atk. 473 (1742).

II. When a fund payable on a contingency has to be set apart at once, as for instance where there is a life interest covering part of the interval, the income goes with the fund. *Kidman* v. *Kidman*, 40 L. J. Ch. 359 (1871). See *Boddy* v. *Dawes*, 1 Keen, 362 (1836).

III. On a legacy to a child or other person to whom the testator stands *in loco parentis*, interest is allowed as maintenance, although the legacy be contingent or payable *in futuro*, but only so far as maintenance is not provided for otherwise. *Ineledon* v. *Northcote*, 3 Atk. 430, 438 (1747). *Chambers* v. *Goldwin*, 11 Ves. 1 (1805). *May* v. *Potter*, 25 W. R. 507 (1877).

On a contingent devise of a residue of realty and personalty together, the income of the whole accumulates, *Genery* v. *Fitzgerald*, Jac. 468 (1822). See, *accord.*, *Ackers* v. *Phipps*, 3 Cl. & F. 665 (1835). *In re Dumble*, 23 Ch. D. 360 (1883).

CHAPTER X.

DETERMINATION OF CLASSES.

NOTE. — *Rule in Wild's Case.* Here, perhaps as well as anywhere, a rule of construction, often referred to, may be noticed. If a devise is made to A. and his children, and A. has children living at the time of the devise, A. and the children are at common law, joint tenants for life. If A. has, at that time, no children, he takes an estate tail. *Wild's Case*, 6 Co. 17 (1599); *Clifford* v. *Koe*, 5 Ap. Cas. 447 (1880). See 2 Jarm. Wills (4th ed.) 389–400. The time to be referred to in applying this rule is the date of the making of the will, and not of the testator's death. *Seale* v. *Barter*, 2 B. & P. 485 (1801). But cf. 2 Jarm. 391, 392.

WELD *v.* BRADBURY.

CHANCERY. 1715.

[*Reported* 2 *Vern.* 705.]

WICKSTEAD WELD, the plaintiff's father, devised his stock without doors to be sold by his executors, and after debts and legacies paid, the surplus arising by sale to be put out at interest; and one moiety to be paid to the younger children of the plaintiff, living at his death, and the other moiety to the children of J. S. and J. N.

Neither J. S. nor J. N. had any child living at the making of the will, or at the death of the testator.

PER CUR. [LORD COWPER, L. C.] It must be intended an executory devise, and to be to such children, as they, or either of them should at any time after have, and the children to take *per capita*, and not *per stirpes*, they claiming in their own right, and not as representing their parents.[1]

DEVISME *v.* MELLO.

CHANCERY. 1782.

[*Reported* 1 *Bro. C. C.* 537.]

STEPHEN DEVISME,[2] having made his will in 1763, added a codicil March 20, 1770, which contained this provision: "I give and bequeath a further sum of £5000 sterling, to purchase stock, and the interest to

[1] On a gift to a class after a preceding interest, when on the termination of such interest, none of the class are yet *in esse*, see 2 Jarm. Wills (4th ed.) 170–177.

[2] The following statement is abbreviated from the report, and one of the points is omitted.

be paid to my mother Marianne Devisme; at her death the interest to be paid to my brother William Devisme; and at his decease, to my godson Stephen; at his decease, if before he is of age, to be divided among his brothers equally."

Stephen Devisme, the testator's godson, had died, aged four years, February 26, 1770, before the making of the codicil. The testator died in November, 1770. Stephen Devisme, the godson, was the son of the testator's brother William Devisme. Besides Stephen, William Devisme had two sons who were living both at the date of the codicil and at the time of the testator's death, and another son Andrew, who was born in 1778.

Marianne, the testator's mother, died in 1779, and William Devisme in 1781.

The sum of £5000 had been invested in stock. The two sons of William Devisme, who were living at the testator's death, and had attained twenty-one, brought this bill, that their shares might be transferred to them. The question was, whether Andrew Devisme was entitled to share.

Lord Chancellor [Thurlow] was of opinion, that he was obliged to say the words in the bequest of £5000 to brothers of Stephen, were not confined to those who were his brothers at the time of making the codicil; that the testator must have had in contemplation other sons coming into being; that the intention of the testator appeared to be to make an aggregate description of a part of the family of William, by the name of brothers of Stephen, as if he had used the words male children of William, that he made use of the word *brothers* merely by relation to the antecedent, the name of Stephen used in the former part of the bequest, and that he could not otherwise have described the sons of William but by a circumlocution; he therefore declared that Andrew, being born before the time of distribution of the fund, was entitled to a share of the £5000.[1]

AYTON *v.* AYTON.

Chancery. 1787.

[*Reported* 1 *Cox*, 327.]

George Lee, by his will of the 10th of October, 1762, "gave unto his wife Mary Lee, the whole rest, residue, and remainder of all his stock, government securities, money, and estates real and personal, for her life and no longer. Upon her decease he gave and bequeathed them to the children of Mr. John Ayton and his wife Jane, to be equally divided amongst them the said Jane Ayton's children, and not to any children by another marriage of either party."

[1] So, though the life interest is not created by the testator, *Walker* v. *Shore*, 15 Ves. 122 (1808).

At the time of the death of the testator and his widow Mary, the petitioners John and Susannah Ayton, were the only children of John and Jane Ayton, but after the death of the widow they had three more children, Hannah, Jane, and Elizabeth.

By the decree made in this cause by the *Master of the Rolls* on the 5th of December, 1765, his Honor declared, that according to the words of the will, the testator meant to comprise not only such of the children of John and Jane Ayton as were living at the time of the making the will, and at the testator's death, but also all the children there should be of such marriage, and gave directions for applying the fund for benefit of the petitioners, "and any other child or children of the said John and Jane Ayton, as shall be living at the time of the death of Ayton and his wife, or either of them."

The petitioners now applied to have the cause reheard, complaining of the decree being erroneous in extending the construction of the words to children born after the death of the widow Mary Lee.

Scott, for the petitioners.

Madocks, on the other side.

Master of the Rolls. [Sir Lloyd Kenyon.] This certainly is a question of construction, viz. whether by the words the testator has made use of, he meant to comprise one class of children or another; but in this, as in many other cases, there are technical rules of construction, which are as binding on the court as rules of law in other cases. The rule of construction applicable to the present case is settled, and settled most conveniently for the parties, by the case of *Ellison* v. *Airey*, 1 Ves. 111. So many children as come *in esse* before the time when the fund is distributable shall be comprehended, and no more; the vesting is not to be suspended till other children are born, to take away from the shares of the former. There are many other cases to this point. *Roberts* v. *Higham*, 12th July, 1779; *Congrave* v. *Congrave*, March, 1781; *Bartlett* v. *Lynch*, 26 May, 1757; *Baldwin* v. *Karver*, January, 1774, Cowp. 309, Doug. 503; *Isaacs* v. *Isaacs*, December, 1768; *Devisme* v. *Mello*, July, 1782. The general words will extend beyond children in being; for it will take in any child born before the remainder takes effect, and therefore so far I shall certainly go in this case; but the decree in 1765 goes further, and extends it to all the children of the marriage, which is a construction that would be attended with very great inconveniences; and I cannot see sufficient in the words confining the bequest to the children of the present marriage to break in upon the rule. I must therefore reverse the decree, and declare my opinion, that in the events which have happened the absolute interest in the residue vested in the children born before the death of Mary Lee, and not in the children born afterwards.

GILMORE *v.* SEVERN.

CHANCERY. 1785.

[*Reported* 1 *Bro. C. C.* 582.]

TESTATOR gave to the children of his sister Jane Gilmore, wife of Thomas Gilmore, £350 with interest for the same, to be paid them respectively, their equal shares and proportions as they should respectively attain twenty-one; and in case any of them should die under twenty-one, then their shares should go to the survivors and survivor.

At the death of the testator, Jane Gilmore had two children, the plaintiffs; afterwards she had another child: the plaintiffs were both infants; and the COURT [SIR LLOYD KENYON] was of opinion, that the youngest child, being born during the infancy of the other two, though after the death of the testator, might be entitled to a share.

As none were entitled to a vested interest, the court ordered the money to be paid into the bank.[1]

VINER *v.* FRANCIS.

CHANCERY. 1789.

[*Reported* 2 *Cox*, 190.]

JOHN WIGGINGTON by will gave to his brother Samuel Wiggington £6000 in trust *for the use and benefit of his children*, to be equally divided between them, either in his lifetime or at his death, when, and in such manner as he should judge most convenient and beneficial to them. He gave to his sister Martha Selby £3000, the interest of which he gave to her for her own use during her life; and at her death he desired the principal might devolve to her son Miles Selby, unless she should have more children, and then the same sum to be shared equally between them. He then added, "*Item*, I give unto the *children of my late sister Mary Crowser*, the sum of £2000 to be equally divided among them. Note, to the above three legacies I desire £100 may be paid to each within one month after my decease, to buy mourning, &c." And after giving several other legacies, he gave the residue, after payment of debts and legacies, thus: "I give unto my brother Samuel Wiggington one third of the residue, and one third more to my sister Martha Selby, and the other third I give to the children of my late sister Mary Crowser, equally to be divided between the children of my brother

[1] See *In re Emmet's Estate*, 13 Ch. Div. 484 (1880). Cf. *Bateman* v. *Gray*, L. R. 6 Eq. 215 (1868); *Gimblett* v. *Purton*, L. R. 12 Eq. 427 (1871).

Samuel Wiggington, my sister Martha Selby, and the children of my late sister Mary Crowser."

At the date of the will there were three children of Mary Crowser living, viz., John, Elizabeth, and William. William died *after the date of the will*, in *the lifetime of the testator;* and it was contended that one-third of one-third of the £2000 given to the children of Mary Crowser lapsed into residue, and that one-third of the residue lapsed, and was payable to the next of kin, as undisposed of.

Master of the Rolls. [Sir Richard Pepper Arden.] There is no doubt in this case on the bequest to the children of Samuel Wiggington, for all his children were living at the death of the testator. It was once indeed thought that a bequest to "the children of A." might extend to *all* children born at any future time; but *Devisme* v. *Mello*, 1 Brown Cha. Rep. 537, has settled that such children shall take, as are born at the time the distribution of the fund is to take place. The doubt in this case arises on the clause which gives "to the children of my late sister Mary Crowser" the sum of £2000 to be equally divided. As I said before, the general rule as settled by *Devisme* v. *Mello* is, that the children *living at the time of the distribution of the fund*, shall take; if it is to be distributed at the time of the testator's death, then such children as shall be *then* living; if distributable at the death of some *other* person, then the testator is to be supposed to mean such children as shall be living at the time of the death of such other person. Then the question is, whether a gift to the children of *his late sister* Mary Crowser is or is not indicative of an intention different from that which would be imputed to him under the general rule, that is, whether he meant the *particular* children living at the time he made his will, to take the fund equally between them, or whether it was not the same thing as if he had given the £2000 "to the *three* children of my late sister;" for in that case it would have been a legacy to three *personæ designatæ*. Now when a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living at the time of his death. If so, why should I suppose that the *sister being dead*, he meant anything else than what would be imputed to him in the other case? This is not like the case of *Lord Bindon* v. *Earl of Suffolk*, 1 P. W. 96, for there the gift is to the *five* grandchildren, which shows that he had *particular* objects in view. But the general rule, I take it, comes to this, to *exclude* all children, who, although living at the date of the will, yet die before the testator, and to include all those who are living at the time of the distribution, although born after the will or the death of the testator.[1]

[1] See *Lee* v. *Pain*, 4 Hare, 201, 250 (1844); *Philps* v. *Evans*, 4 De G. & Sm. 188 (1850).

HILL *v.* CHAPMAN.

CHANCERY. 1791.

[*Reported* 3 *Bro. C. C.* 391.]

THE testator, John Spackman, made his will, dated 15th January, 1785, and thereby[1] gave the residue to his trustees, the defendants, in "trust for the benefit of all his grandchildren, by his daughter Sarah, equally to be divided between them, and laid out for their respective benefit" ["as aforesaid."] The testator made two codicils to his will, and by the latter, dated 19th November, 1785, he gave annuities to his servants to the amount of £30 a year, and directed £1000 Three per cent Bank Annuities to be set apart to pay these annuities.

The plaintiffs were the children of the testator's daughter, Sarah Hill, born before the death of the testator.

The defendants were the trustees, and a child born after the death of the testator (but during the life of the annuitants), who was brought before the court, by a supplemental bill.

And the question was, whether the after-born child should take a share of this £1000.

Mr. Mitford and *Mr. Cooke*, for the after-born child.

Mr. Mansfield, for the plaintiffs.

LORD CHANCELLOR [THURLOW]. Where a supplemental bill brings a new person or a new interest before the court, it is open to the parties to make any objection to the decree that might have been made at the first hearing.

It is intelligible, that by "the children of A." the testator means children *then* born; if you go further, it must extend to all possible children. To tie it up to the death of the testator, is rather a forced construction.

Where it is to one for life, and then to the children, it shows the intention to be children born then. If it was a specific legacy to one for life, and then to be divided, there could be no doubt.

If it were of a part to one for life, then to fall into the residue, and then the residue was ordered to be divided among children, the same principle would apply; which must extend to all the children: therefore, if the £1000 was to be divided at the death of the surviving annuitants, it must be divided among *all* then born; but the difficulty here is, that the general estate must be divided at the death of the testator. The circumstance of taking out a part for the special purpose does not seem very material. If he says nothing upon the sub-

[1] After having given distinct legacies to the children of his daughter, Sarah Hill, *nominatim*, directing the mode of investment, and the time when each legatee should have the possession; see the report in 1 Ves. Jun. 405, and the MS. reports of the judgment. —BELT'S NOTE.

ject, upon the death of the surviving annuitant it must sink into the residue, which is divisible at the testator's death; and it is repugnant to say, one part of the residue shall be divisible at one time, and the other part at another.

I think it must fall into the residue.

I have always thought that the case of *Ellison* v. *Airey*, 1 Vesey, 111, went on a refinement, and was beside the intention of the testator.[1]

ANDREWS *v.* PARTINGTON.

CHANCERY. 1791.

[*Reported* 3 *Bro. C. C.* 401.]

ROBERT ANDREWS, grandfather of the plaintiff, made his will, bearing date 19th August, 1763, and thereby gave to the defendants, Partington and Andrews (the father of the plaintiffs), all his real and personal estates (subject to debts): in the first place, to pay taxes, repairs, and for the renewal of leases; and out of the rents, &c., to pay his wife, Margaret, £800 a year, until his daughters, Diana and Catherine, should marry; and after their marriages, £600 a year for life; and subject and without prejudice thereto, out of the rents and profits, to raise £3000, as soon as might conveniently be, after his decease, to be paid in manner following: *i. e.*, £2000 to his daughter Diana, and £1000 to his daughter Catherine, accumulating the surplus rents and profits during the life of his wife; and, after the decease of his wife, the further sum of £7000 to be paid to his daughters, at such times, and in such proportions, as therein mentioned; *i. e.* £3000 to Diana, on the day of her marriage, and £4000 to Catherine, on the day of her marriage, provided such marriages should happen after the decease of his wife; and in case either of his daughters should marry in the lifetime of the wife, then her share to be paid her within six months after the death of the wife; the shares of the daughters, after decease of the wife, to bear interest at four per cent; and in case his said daughters, or either of them, should die unmarried, then, upon trust, to pay the share or shares of her or them so dying in the manner following: *i. e.*, £2000, part of the £3000 share of Diana, to all and every the child and children of his son Robert Andrews, equally to be divided between and among them; if more than one, share and share alike; and if but one, then to such only child; the parts or shares of such child or children to be paid in manner following: *i. e.*, the daughter's shares at her or their age or ages of twenty-one, or day or days of marriage, which should first happen; and the son's share or shares, at his or their age or ages of twenty-one; or to be sooner advanced, for his or their preferment in the world, or benefit, if the

[1] See, *accord.*, *Hagger* v. *Payne*, 23 Beav. 474 (1857).

trustees, or the survivors of them, &c., should think fit, with survivorship among the children, the dividends and interest thereof to be paid by the trustees, toward the maintenance and education of such child and children, till their shares become payable, in proportion to their respective shares and interests therein; and in case all the children should die before their shares became payable, then the £2000 to be paid to his son Robert Andrews. The testator also declared the uses as to the remaining £1000 given to his said daughter Diana, for the benefit of the children of his daughter Margaret Ashcroft; and with respect to £2000 of the £4000, his daughter Catherine's share, he also gave it in the same manner with the first £2000 given to his daughter Diana; and the other £2000, part thereof, he gave among the children of his daughter Margaret Ashcroft, in the manner therein mentioned; and he gave the residue of his estate, after the death of his wife, after payment of £1000, to his son Robert Andrews, and three annuities, to persons since dead, to the children of defendant, Robert Andrews, in the same manner with the £2000 given in the first place to Diana.

The testator died 27th August, 1753, and his wife and defendant Partington, proved his will.

The widow died 23d May, 1774, leaving defendant Partington the surviving executor.

Catherine Andrews, one of the testator's daughters, intermarried with John Neale Pleydell Nott, Esq., and £4000 part of the £7000 were, after decease of the mother, paid to the trustees named in the settlement upon the marriage, together with £1100 arising from savings, and from another fund.

The remaining £3000 was never raised; Diana, the other daughter, never having married; but interest for the same has been paid to her from the death of the widow.

Sarah Andrews, wife of the defendant, Robert Andrews, son to the testator, died in April, 1781, and the plaintiffs are the children of that marriage, six of whom had attained their ages of twenty-one, previous to the filing of the bill, and the six others were minors.

The bill prayed (among other things) that the freehold and leasehold estates might be sold, and six twelfth parts of the produce, and also of the residue, and accumulation, might be paid to the six plaintiffs, who had attained twenty-one, and the remaining six twelfth parts be placed out at interest for the benefit of such of the plaintiffs as are infants, &c.

The cause came on to be heard 1st March, 1790, when the only question decided was, relative to the maintenance (*vide* 3 Bro. C. C. 60), and it was referred to the master, to inquire (*inter alia*) what children the defendant Andrews then had, and had had, and at what times they were respectively born, and in case any of them were dead, then when they respectively died.

July 11, 1791, the master made his report, and thereby stated, that the defendant, Robert Andrews, had issue by his late wife, the following

children, and no more; plaintiff Elizabeth, born 1761, Robert, 1762, Catherine, 1764, George, 1765, Charlotte, 1766, Sarah, 1767, Cæsar, 1770, Hugh, 1772, Henry, 1773, Frederick, 1775, Marianne, 1777, Augustus, 1779; and that, besides the above-mentioned children, the defendant, Andrews, had an issue by his said wife, the following children, who were dead; Sarah, born 1760, died 1763; John, born 1769, died 1783; and Charles, born 1776, and died in the same year.

And now the cause coming on for further directions upon the master's report, the question was, what children should take under the bequest of the residue? 1st. Whether all such children as the defendant Robert should have at the time of his death? 2d. Whether it should be confined to such as were living at the death of Margaret, the testator's widow? Or, 3d. To such children as were living at the time the eldest child attained the age of twenty-one?

Lord Chancellor [Thurlow] said where a time of payment was pointed out, as where a legacy is given to all the children of A., when they shall attain twenty-one, it was too late to say, that the time so pointed out shall [not] regulate among what children the distribution shall be made. It must be among the children *in esse* at the time the eldest attains such age. He said he had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children.

HUGHES *v.* HUGHES.

Chancery. 1792.

[*Reported* 3 *Bro. C. C.* 352, 434.]

Thomas Chamberlain, being seised and possessed of real and personal estates, made his will, 22d July, 1779, and thereby, devised his real estate in the county of Oxford to trustees, in trust for his grandson, Thomas Chamberlain Hughes, for life, with remainders over, subject to an annuity of £100 to his daughter Rebecca Hughes, for life, and after giving £400 in trust, for Elizabeth Cross for life, and afterwards for her children, and after giving directions touching £2000 Three per cent Bank Annuities, therein mentioned to have been appointed for the use of the plaintiff Susannah Adlam, and her children, and directing that, in case of the death of all her children under twenty-one and before marriage, the said £2000 should revert to, and be part of the residuum of his personal estate; the testator directed that the rents and profits of his houses in Princes Street, &c., and the dividends of his moneys in the public funds, and all other his personal estate, except the above £2000, should be paid and applied by the trustees, in the manner following; unto each of his two daughters, the

plaintiffs Susannah Adlam, and Devereux Kennedy, to each of their separate use, the yearly sum of £100 during their lives, and subject thereto, to pay all the rest and residue of said last-mentioned rents and profits, and interest, for the maintenance and education of all the children of his said three daughters, Rebecca Hughes, Susannah Adlam, and Devereux Kennedy (except said Thomas Charles Hughes, or such of his grandsons as should be in the receipt of the rents of the real estate), share and share alike, until the youngest of said grandchildren should attain twenty-one; and in the case of the death of any of them before the youngest should attain twenty-one, who should have been married, and should have at his or her decease a child or children, then testator directed, that such child or children should be entitled to the same share which their deceased parents would have received, in case they had respectively lived till the youngest of such child or children should have attained twenty-one; and when such youngest child should have attained twenty-one, then testator gave one full and proportionable share of the capital thereof, to the proper use of such his said grandchildren as should be then living, and the child or children of such as should be dead.

Devereux Kennedy, at the death of the testator, had six children (who are plaintiffs); she, after his decease, had another child, the defendant, Louisa Kennedy; Rebecca had only one child, the plaintiff, Robert Hughes, but afterwards had issue the defendant Sophia Hughes; and Susannah Adlam had four children, who were also plaintiffs, but, after his decease, had two other of the defendants.

The bill prayed that the rights of the parties might be declared.

At the hearing, the proper accounts had been directed, and further directions reserved.

It came on now again; and the question was, whether the plaintiffs, being the children of testator's three daughters, born at the time of his decease, were to take exclusively of the defendants, who were born after his death, or they were all entitled.

Mr. Mansfield and *Mr. Hollist*, for the plaintiffs.

Mr. Solicitor-General and *Mr. Mitford*, for the defendants. [After contending that all the children would take, the learned counsel added: "At least it will be open till the youngest child then living should attain twenty-one, when the division was to take place. We only ask it for children under that description."]

Lord Chancellor [Thurlow]. When a testator gives all his property to be divided among his children, when they shall attain twenty-one, in so general a manner, the principle of the cases seems to have been, that such a general devise shall embrace all the children, and the distribution must be accordingly made among all: but where the court has ascertained the time as perfectly marked out by the intention of the testator, it is considered as the period of vesting the property in possession, and consequently when it comes to be distributed, it must be among those only who are *in esse* at that time.

Here, however, a fortune is given generally to all the children, and there seems to be no expression, which, either naturally or impliedly, can exclude any of the children from their distributory share: this being a general gift, not narrowed or controlled by any words the testator has used; consequently, the youngest child must take at twenty-one, with the rest.[1]

RINGROSE *v.* BRAMHAM.

CHANCERY. 1794.

[*Reported* 2 *Cox*, 384.]

THE question in this cause depended upon the following clauses in the testator's will: —

"I also give to Joseph Ringrose's children £50 to every child he hath by his wife Elizabeth, to be paid to them by my executors as they shall come of age, and the interest to be paid yearly till they come of age to their father or mother. I also give to Christopher Rhodes's children, that he hath by his wife Peggy, £50 to every child when they come of age, and the interest to be paid yearly till they come of age to their father or mother. And my will is, that my two executors do lodge in Mr. W. Foxhall's hands £600, and £100 in Joseph Ringrose's hands till the children aforesaid come of age, and to receive the interest yearly, and to pay the same to the above-named children or their father or mother. And if any of the children should die before they are of age, then the legacies shall go to my executors."

There were eleven children of Joseph Ringrose and Christopher Rhodes living at the time of the making the will; thirteen at the death of the testator; and three born since.

This bill was filed by the sixteen children of Joseph Ringrose and Christopher Rhodes, claiming to be entitled to £50 apiece under the above bequest.

And it was insisted on the part of the plaintiffs, that there was nothing to confine these legacies of £50 to the children living at the time of making the will, or to those living at the death of the testator; that although the testator has made use of the word "hath," which is properly of the present tense, yet it is evident that he meant thereby "shall have," in the same manner as he afterwards uses the word "come" for "shall come;" that the sum which he has set apart for the payment of these legacies does not tally with the number of the children living at any one of these periods, and therefore nothing can be inferred from thence, except that he did not mean to confine the legacies to the children living at the date of the will; that as the lega-

[1] See s. c. on rehearing, 14 Ves. 256 (1807). Cf. *Gooch* v. *Gooch*, 14 Beav. 565; s. c. 3 De & G. M. & G. 366 (1853).

cies are not to be paid to the respective legatees until they attain twenty-one, this will at least let in all the children born before any of them arrives at that age. *Gilmore* v. *Severn*, 1 Bro. Cha. Rep. 582.

Master of the Rolls. [Sir Richard Pepper Arden.] The case of *Gilmore* v. *Severn* is very distinguishable from this. In *Gilmore* v. *Severn*, a gross sum of £350 was given to the children of Jane Gilmore, to be paid to them in equal shares at twenty-one, and there was no inconvenience in postponing the vesting of those shares until some one of them attained that age, so as to let in the children born in the mean time, because there was nothing to do but to set apart the sum of £350, and the residue of the testator's personal estate might be immediately divided; for whether more or fewer children divided the £350, still they could have but £350 amongst them. But here there are distinct legacies of £50 to each of the children, and therefore if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of Joseph Ringrose and Christopher Rhodes, or their wives, for I can never divide the residue until I know how many legacies of £50 are payable. Therefore, though I perfectly assent to *Gilmore* v. *Severn*, it is not applicable to this case. At the same time I think I may fairly construe the word "hath," so as to make it speak at the time the will takes effect, and let in the children born between the making of the will and the death of the testator. His Honor therefore declared the thirteen plaintiffs only who were living at the death of the testator, entitled to legacies of £50 each.[1]

LONG *v.* BLACKALL.

Chancery. 1797.

[*Reported* 3 *Ves. Jr.* 486.]

George Blackall being possessed among other things of a messuage, lands, and tenements in Great Haseley, held by lease from the Dean and Chapter of Windsor, for a term of years, by his will, dated the 23d of April, 1709, gave to John Toovey and Richard Blackall, their executors, administrators, and assigns, the said leasehold premises, in trust, that they should permit his wife and her assigns to possess the mansion-house during her widowhood, and to receive the rents and profits of the residue of the premises, until she should marry or die, or until one of her sons should attain the age of twenty-one; and from and after the death or marriage of his wife as for and concerning the said mansion-house, and as for and concerning the residue of the said premises from and after the death or marriage of the said wife, or the

[1] See, *accord.*, *Mann* v. *Thompson*, Kay, 638 (1854); *Rogers* v. *Mutch*, 10 Ch. D. 25 (1878).

time that one of his sons should attain twenty-one, which should first happen, in trust for his son Thomas during his life; and after his decease then in trust for such issue male or the descendants of such issue male of the said Thomas as at the time of his death should be his heir at law; and in case at the time of the death of the said Thomas there should be no issue male nor any descendants of such issue male then living, that the trustees should be possessed of the said premises in trust for the testator's son George Sawbridge, during his life; and after his decease then in trust for such issue male or the descendants of such issue male of his said son as at the time of his death should be his heir at law; and in case at the time of the death of the said George Sawbridge there should be no such issue male or any descendants of such issue male then living, then in trust for the child, with which his said wife was then *ensient*, in case it should be a son, during his life; and after his decease then in trust for such issue male or the descendants of such issue male of such child as at the time of his death should be his heir at law; and in case at the time of the death of such child there should be no such issue male nor any descendants of such issue male then living, or in case such child should not be a son, then the said John Toovey and Richard Blackall, their executors, &c. should be possessed of the said premises in trust for such persons as should then be the legal representatives of him the said George Blackall; and he appointed his wife sole executrix.

The will, as originally prepared, gave the property to the child, of which the wife should be *ensient*, and his issue generally after the decease of the testator's other two children and failure of their issue. It appeared to have been afterwards altered by interlining the word "male" wherever "issue" occurred; and the ultimate limitation originally was, that in default of issue of the unborn son the trustees should be possessed of the premises in trust for "the executors and administrators of my said son Thomas;" those words were struck through with a pen; and the following words were interlined, "such persons as shall then be my legal representatives."

The testator died in June, 1709, leaving his two sons Thomas and George Sawbridge surviving, and his widow *ensient* of a son, afterwards born, viz. John Blackall. The widow proved the will. She married Richard Carter, and having survived him died in 1778, by her will appointing her son Thomas Blackall her executor. He was also executor of his brothers George Sawbridge and John, of whom the former died in 1753, the latter in 1754, both without issue. John Toovey and Richard Blackall assigned the premises and delivered up the lease to Thomas Blackall, who died without issue in March, 1786, having by his will, dated the 9th of March, 1784, devised his freehold and copyhold estates to certain uses, and appointed Lord Viscount Parker, James Musgrave and John Blackall, his executors; and having given the said leasehold estate to the two former in trust for such person or persons, and for such estate and interest, and under and subject to

such charges, provisos, powers, restrictions and limitations, as were mentioned concerning the freehold and copyhold estates devised to them, or as near as the nature of the leasehold estate would permit, with a direction to renew the lease from time to time out of the rents and profits thereof.

The lease, which was originally granted in 1708 to the testator George Blackall for twenty-one years, was several times renewed: first, in the names of the trustees John Toovey and Richard Blackall; afterwards in the name of Thomas Blackall.

John Blackall, Philippa Long, Hester Blackall, Ann Blackall, and Elizabeth Blackall, were the next of kin according to the Statute of Distributions (22 & 23 Car. II. c. 10) of the testator George Blackall at the death of his son Thomas; being the five surviving children of John Blackall, paternal uncle of the testator George Blackall. John Blackall died, leaving his son John Blackall his executor. Ann and Elizabeth Blackall also died, and Hester Blackall was surviving executrix of Ann and administratrix of Elizabeth.

The bill was filed by Philippa Long and Hester Blackall, praying that the new lease may be declared subject to the same uses and trusts as the former lease; and that the defendants John Blackall, Lord Viscount Parker and James Musgrave, may be compelled to deliver possession and the said lease, and account for the rents and profits since the death of Thomas Blackall. Two questions arose: 1st, whether the testator George Blackall intended his personal representatives according to the Statute of Distributions, or under the authority of the ecclesiastical court; 2dly, whether the limitation over was too remote. As to the latter question, when the cause came on for farther directions on the 19th of July, 1796, the Lord Chancellor directed a case to be made for the opinion of the Court of King's Bench, stating the disposition as of the legal bequest of a term of years, and inserting the name of the plaintiff Philippa Long, instead of "in trust for such persons as shall then be my legal representatives;" the question was, Whether the limitation to Philippa Long was good in the events that have happened? The judges by their certificate answered in the affirmative.

The cause came on upon the equity reserved.

Solicitor-General, *Mr. Grant*, *Mr. Romilly*, and *Mr. Bell*, for the plaintiff [cited *Bridge* v. *Abbot*, 3 Bro. C. C. 224, and *Evans* v. *Charles*, 1 Anst. 128.]

Attorney-General, *Mr. Mansfield*, and *Mr. Graham*, for the defendant, John Blackall.

Lord Chancellor. [Lord Loughborough.] I think both the determinations, that have been cited, perfectly right. They show the words are to be explained according to the subject-matter. Have they any meaning, if I take them in the legal sense? I can better tell what was not, than what was, his meaning. It is perfectly clear, referring to a future time he could not mean his legal representatives. He altered a very sensible part of his will, which is vastly strong, for it proves he

thought upon it, and had some decided meaning. His first thoughts were very sensible to give the absolute interest to his son, in case the entail could not take effect. That would have been the wisest thing he could have done. In making that alteration, which he did with deliberation, not suffering his son to take this remainder after all the particular purposes were exhausted, it is quite impossible he should mean it to vest in his wife, transmissible to those who should become her legal representatives. It would be too much conjecture to apply the words to an heir at law, particularly upon leasehold property. There is nobody, I think, who can take it but the next of kin at the time of distribution. He certainly meant to keep it in his blood. He could not mean that it should be as if he had not disposed of it, clearly.

Decreed in fifths: one-fifth to the plaintiff Philippa Long; three-fifths to the plaintiff Hester Blackall; and one-fifth to the defendant John Blackall.[1]

HOLLOWAY *v.* HOLLOWAY.

CHANCERY. 1800.

[*Reported* 5 *Ves.* 399.]

EDWARD REEVES by a codicil, dated the 21st of July, 1763, gave to trustees the sum of £5000: in trust to put the same out at interest on Government or other securities, and to pay the interest, income and produce, thereof to his daughter Hindes for and during the term of her natural life, separate and apart from her husband. The codicil then proceeded thus: —

"And after the decease of my said daughter Hindes then upon this farther trust, that they, the said Augustine Batt and Benjamin Holloway, their executors or administrators, do pay the said £5000 unto such child or children of my said daughter Hindes as she shall leave at the time of her decease in such shares and proportions as she shall think proper to give the same; and in case she shall die leaving no child, then as to £1000, part of the said £5000, in trust for the executors, administrators or assigns, of my said daughter Hindes: and as to the £4000 remainder of the said £5000, in trust for such person or persons as shall be my heir or heirs at law."

The testator died in 1767; leaving his daughter Susannah Hindes and two other daughters his co-heiresses at law and his next of kin at the time of his death. Susannah Hindes having survived her husband died without issue in August, 1798.

The bill was filed by the great-grandchildren of the testator by his two other daughters, the plaintiffs being his co-heirs at law at the

[1] See *Wharton* v. *Barker*, 4 K. & J. 483 (1858).

death of Susannah Hindes, against the representatives of the surviving trustee, and against several other persons, who with the plaintiffs were the next of kin of the testator and of Susannah Hindes; praying, that the plaintiffs, as co-heirs of the testator at the death of Susannah Hindes, may be declared entitled to the said £4000, &c.; or in case the court shall be of opinion, that any other construction ought to be put upon such bequest, then that the rights of the plaintiffs and defendants may be declared, &c.

Mr. Richards, for the plaintiffs.

Mr. Martin, for the personal representatives of Benjamin Holloway, a grandson of the testator.

Mr. Romilly and *Mr. Bell*, for the next of kin of the testator.

Master of the Rolls. [Sir Richard Pepper Arden.] This question arises upon a very doubtful clause in this codicil. Unquestionably it is competent to a testator, if he thinks fit, to limit any interest to such persons as shall at a particular time named by him sustain a particular character. The only question is, whether upon the true construction of this codicil it must necessarily be intended, he did not mean by these words what the law *prima facie* would, strictly speaking, intend, heirs at law at the time of his death. A testator certainly may by words properly adapted show, that by such words *persona designata*, answering a given character at a given time, is intended. But *prima facie* these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time: nor from the nature of the gift is there any necessary inference, that it should not mean, what the law would take it to mean, heirs at the death of the testator. It is not like the case of *Long* v. *Blackall*, 3 Ves. Jr. 486. The words there put it out of the power of the court to put upon it any other interpretation; though it was much contended, that it meant at the death of the testator. In that case the word "*then*" plainly proved that the personal representatives at the time of the death were not intended; and if that word had not occurred, there was a great deal to show, it could not be the intention (and that applies here); for there the wife was his executrix; and it would have been a strange, circuitous, way of giving it to her.

In *Bridge* v. *Abbot*, 3 Bro. C. C. 224, and *Evans* v. *Charles*, 1 Anstr. 128, a great deal of discussion took place upon such words as these. In the first of these cases it was contended, and I had for some time little doubt upon it, that it was intended to give a vested interest to a party, who was dead before: but from the absurdity of that and of letting it be transmissible from a person, in whom it never vested, I was of opinion, that upon the true construction it must have been intended such persons as at the death of the testatrix would, if John Webb had then died, have been his personal representatives. I wish to add a few words to the report of that case, to show, what the

decree was. The report states, that I declared the persons entitled as legal representatives to be the persons, who would have been entitled as next of kin to John Webb at the death of Mary King. I desire, that these words may be added: "in case he had at that time died intestate." I believe, those words were added in the decree.

The case of *Evans* v. *Charles* arose upon similar words, but under very dissimilar circumstances. Lord Chief Baron Eyre observes upon *Bridge* v. *Abbot;* and though the decision of the court was different from mine, they seem to think my opinion right in that case. *Evans* v. *Charles* was determined upon other grounds; upon which the Court of Exchequer felt themselves obliged to give to the administratrix of the creditor. There is certainly an obvious distinction between them. It was truly said in *Evans* v. *Charles,* that it must always be taken together with the context. The words must have their legal meaning, unless clearly intended otherwise. In this case I was struck with the circumstance of the gift to the daughter for life, &c.; giving it to the heirs at law; of whom she would be one. But that alone would not, I apprehend, be sufficient to control the legal meaning of the words. If an estate for life was devised to one, and after his death to the right heirs of the testator, it never would be held, that, though the tenant for life was one of the heirs, that would reduce him to an estate for life: but he would take a fee.

Long v. *Blackall* has that very leading distinction from this case upon the word "*then;*" that there could be no doubt personal representatives at a given time were intended. I must therefore hold, that, if that word had not occurred, the judgment of the Lord Chancellor would not have been such as it was; but, as it is, I perfectly concur in that judgment, together with the argument from the circumstances.

In this case I cannot upon that ground alone, that the daughter named in the will was one of the heirs at law, hold, that heirs at a particular time were intended. My opinion is, that there is not enough in this will to give the words any other than their *prima facie* construction: heirs at law at his own death. If so, it would be a vested interest in the persons answering that description at his own death. I have not put this construction upon it in order to avoid the difficulty, that would otherwise arise: but I am very glad, that this relieves me from the necessity of stating, who are meant by the words "*heirs at law*" as to the property, which is the subject of this bequest. This is personal property; and it is said, that though "heirs, &c.," have a definite sense as to real estate, yet as to personal estate it must mean such person as the law points out to succeed to personal property. I am much inclined to think so. If personal property was given to a man and his heirs, it would go to his executors. I rather think, if I was under the necessity of deciding this point, I must hold it heirs *quoad* the property: that is, next of kin: but I am relieved from that; as, if heirs, at his death are meant, they are the same persons; the three daughters being both heirs and next of kin; and

if they did not take as heirs at law, they took an absolute interest in themselves in the personal estate. Great difficulties would arise from the construction, that heirs at law are intended, and applying it to personal property. He might have different heirs at law: heirs descending from himself as first purchaser: heirs *ex parte paterna* and *ex parte materna*. I am inclined to think, the court would in such a case consider him as the first purchaser; so as to take in both lines. However, there is no occasion to say anything upon that.

Declare, that the words "*heir or heirs at law*" in this will must be taken to mean heir or heirs at law at the time of the testator's death; and that the sum of £4000 vested in his three daughters.[1]

DAVIDSON *v.* DALLAS.

CHANCERY. 1808.

[*Reported* 14 *Ves.* 576.]

ALEXANDER DAVIDSON by his will bequeathed to the children of his brother Robert Davidson £3000 to be equally divided among them; and if either of them should die before the age of twenty-one years their share to go to the survivors.

The testator died in 1792. The master's report stated, that at the death of the testator there were six children of his brother, the eldest of whom was at the date of the report of the age of fourteen, and two more children were born since the report. A decree had been taken, without argument, declaring that the two children of Robert Davidson, born after the death of the testator, and all the other children to be born, until the eldest child should attain the age of twenty-one, were equally entitled with the children who were born before the testator's death. The cause came on upon an appeal from the decree.

Sir Samuel Romilly and *Mr. William Agar*, for children living at the death of the testator.

Mr. Richards, for the children born after the testator's death.

THE LORD CHANCELLOR. [LORD ELDON] This legacy is a vested interest, subject to be devested by the death of any of the children under the age of twenty-one, leaving another child surviving. It is an immediate legacy to the children, living at the testator's death; in whom it vested at that time; equally to be divided among them; with a limitation over, if either of them should die before the age of twenty-one, to the survivors. That period of division and vesting is the death of the testator; and that, which is to be divided and vested at that

[1] See, *accord.*, *Ware* v. *Rowland*, 2 Phil. 635 (1848); *Bird* v. *Luckie*, 8 Hare, 301 (1850), in which case the persons having the life interest were the sole heirs and next of kin; *In re Trusts of Barber's Will*, 1 Sm. & G. 118 (1852); *Lee* v. *Lee*, 1 Dr. & Sm. 85 (1860); *Abbott* v. *Bradstreet*, 3 Allen, 587 (1862).

time, may in certain events go over to some of those, among whom it was to be divided, and in whom it vested, at the testator's death. The difficulty that has always been felt to apply the term "survivors" to those, who may not be alive at the time of the distribution taking place, has been met by presuming, that the testator intended persons, not then living, but who might come into existence before the distribution; construing the word "survivors" as "others:" to take in all who should come into existence before that period. There is nothing in this will, indicating a general intention, upon which the forced construction of the term "survivors" has been adopted. These words must therefore have their natural meaning.

The decree declared, that those children only of the testator's brother, who were living at the death of the testator, were entitled.

STORRS *v.* BENBOW.

CHANCERY. 1833.

[*Reported* 2 *Myl. & K.* 46.]

A CODICIL to the will of William Townsend contained a bequest in the following words: "Item, I direct my executors to pay, by and out of my personal estate exclusively, the sum of £500 apiece to each child that may be born to either of the children of either of my brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship."

The question was, whether the plaintiff, William Townsend Storrs, who was a grandchild of one of the testator's brothers, and who was born after the testator's death, was entitled to a legacy of £500, under this bequest.

Mr. Bickersteth and *Mr. Parker*, for the plaintiff.

Mr. Pemberton and *Mr. Ching*, contra.

THE MASTER OF THE ROLLS. [SIR JOHN LEACH.] This is an immediate gift at the death of the testator, and is confined to the children then living. The words "may be born," provided for the birth of children between the making of the will and the death. The cases of *Sprackling* v. *Ranier*, 1 Dick. 344, and *Ringrose* v. *Bramham*, 2 Cox, 384, are direct authorities to this point. To give a different meaning to the words "may be born," would impute to the testator the inconvenient and improbable intention that his residuary personal estate should not be distributed until after the deaths of all the children of either of his brothers.[1]

[1] See, *accord.*, *Butler* v. *Lowe*, 10 Sim. 317 (1839); but cf. *Defflis* v. *Goldschmidt*, 1 Mer. 417 (1816); *Mogg* v. *Mogg*, Ib. 654 (1815); *Gooch* v. *Gooch*, 14 Beav. 565, 576, 577 (1851); s. c. 3 De G. M. & G. 366, 380 (1853); *Storrs* v. *Benbow*, 3 De G. M. & G. 390, 394 (1853); Hawkins, Wills, 70.

MAINWARING *v.* BEEVOR.

CHANCERY. 1849.

[*Reported* 8 *Hare*, 44.]

WILLIAM CARVER by his will, dated in 1835, after bequeathing to his trustees all his shares and moneys standing in his name in divers stocks, funds, and securities, and after declaring trusts of three several sums of £30,000 consols, for the benefit of his widow and sons, William James Carver and James Carver, for their respective lives, with remainder to the children of his said two sons, or their issue, — declared that, as to the residue of his consols, his £3 per cent reduced stock, his New £3½ per cent, and his bank stock, and all other the stocks and funds or securities which might be standing in his name at his decease (except the said three sums of £30,000 consols), his trustees should stand possessed of such residue, upon trust (after paying an annuity of £20 to Mary Scott for her life), to pay and apply such part and proportion of the dividends, interest, and annual produce of the residue, as the said trustees or the survivors or survivor of them might in their or his discretion deem necessary, for or towards the maintenance and education of all and every of his grandchildren, the children of his said two sons, William James Carver and James Carver, until they should severally attain the age of twenty-one years. And the testator directed, that the surplus of such dividends, interest, and annual produce, which should not be wanted and applied for the purpose last aforesaid, should be invested by his trustees in government securities (with power to vary and transpose the same), and proceeded: "And when and as each of my said grandchildren shall attain the age of twenty-one years, upon trust that they my said trustees, &c., do and shall, by the sale of such part of the stocks, funds, and securities then standing in their names or name, as may be necessary for the purpose, raise and pay to each of my said grandchildren so attaining the age of twenty-one years as aforesaid, the sum of £2000 for their own benefit. And I do hereby declare, that when and so soon as all and every my said grandchildren shall have attained their age of twenty-one years, they my said trustees, &c., do and shall stand possessed of the whole of the stocks, funds, and securities then standing in their names, upon any of the trusts of this my will (over and above the three several sums of £30,000 £3 per cent consols, hereinbefore by me disposed of), upon trust to pay, transfer, divide, and make over the same respectively, and the dividends, interest, and annual produce thereof, unto, between, and amongst all and every my said grandchildren, to and for their own absolute use and benefit as tenants in common, and not as joint tenants. Provided always, and I do hereby declare, that if I shall have only one grandchild who shall live to attain the age of twenty-one years, then

such one grandchild, upon his attaining that age, shall have and be entitled to the whole of the stocks, funds, and securities, and the dividends, interest, and annual produce thereof, to which my grandchildren, if more than one should have attained the age of twenty-one years, would have become entitled. And I do hereby further declare, that each of my grandchildren, upon their severally attaining the age of twenty-one years, shall take vested interests under this my will. Provided also, and I do hereby further declare, that in case any or either of my grandchildren shall at any time during his, her, or their minority, go or be taken beyond the seas, for the purpose of being or to be educated in any foreign country, or for any purpose whatever, and shall remain beyond the seas or in any foreign country, for any purpose whatever, more than three calendar months in any one year, then and in every such case, and from thenceforth, the claim, right, and title of each and every such grandchildren so going or being taken beyond the seas to maintenance and education out of or in respect of any moneys or property to which they, he, or she may be entitled under this my will, shall cease and determine and become forfeited; but so, nevertheless, that such forfeiture shall not in any respect affect the right of such grandchild or grandchildren to the principal of such moneys and property, upon his, her, or their attaining the age or ages hereinbefore mentioned for payment of the same."

The testator died in 1837, leaving his two sons surviving. William James, one of the sons, had five children living at the testator's death. James, the other son, was unmarried. The youngest of the five grandchildren attained twenty-one years of age in 1848, and no others had been born. The grandchildren then filed their bill for the execution of the trusts of the residue of the stocks, funds, and securities, and for a declaration that they were entitled to an immediate transfer of their respective shares. Mary Scott the annuitant was dead, but the sons, William James and James, were still living.

The Solicitor-General and *Mr. Prior*, for the plaintiffs.

Vice-Chancellor. [Sir James Wigram.] In the case of a gift to children when they attain twenty-one, the reason of the rule of the court is, that the eldest child, on attaining twenty-one, has a right to demand his share, and that this right is inconsistent with a gift to "all the children," including those who may afterwards be born of the parent named. In this case there is no such inconsistency. Here there is no express direction, conferring upon the grandchildren the right now to receive their shares, and no inconsistency would arise from holding all the grandchildren born in the lifetime of either of the parents named in the will, entitled to participate. If the class is to be confined to the grandchildren *in esse* at the death of the testator, the argument is intelligible. In the case of *Elliott* v. *Elliott* [12 Sim. 276], the Vice-Chancellor seems to have adopted that construction, on the ground that it brought the bequest within the rules of law as to remoteness, proceeding, I suppose, on the principle, that where a will admits

of two constructions, that is to be preferred which will render it valid. The rules of construction cannot, however, be strained to bring a devise or bequest within the rules of law. If the class cannot be so restricted in this case, and grandchildren born after the death of the testator are to be admitted, there does not appear to be any reason for excluding a grandchild, born or to be born in the lifetime of either of the testator's sons.

Mr. Wood and *Mr. Edward Cooke*, for the trustees.

VICE-CHANCELLOR. Where a testator has given two inconsistent directions, and has said, that the children, or (which is the same thing) all the children, shall participate in the fund, and then directs that there shall be a division when or as soon as each attains twenty-one, in that case you must do one of two things, — you must either sacrifice the direction that gives a right to distribution at twenty-one, or sacrifice the intention that all the children shall take. The court has in such cases decided in favor of the eldest child taking at twenty-one, as the will directs, and sacrificed the intention that all the children shall take. In this case, the testator has given the residue to all the children of his two sons, when the youngest attains the age of twenty-one years. There are a certain number of children, and the elder children attain twenty-one. The inconvenience pointed out by Mr. Prior then arises: the provision for the maintenance of those children ceases, though, as it cannot be certainly said that the youngest child has attained twenty-one, they cannot claim a distributive share of the fund. The question is, how long is the eldest child or the other children to wait. If the objects of the testator's bounty can be confined to children of his sons living at his death, — which, independently of the fact that there is one son who had no children at that time, I am clear cannot be done in this case, — it might be possible to get at the conclusion which I have already mentioned, that, the moment the eldest attained twenty-one, the period pointed out for division arrived. If it be once admitted that a child born after the death of the testator may take, all the inconvenience is let in, and the eldest child may have to wait for an indefinite time, so long as children may continue to be born. How in that case is it possible to limit the class entitled in the way suggested, which is, that the moment the youngest child *in esse* attains twenty-one, there is to be a division, although there may be an unlimited number of children born afterwards? I do not see how the inconvenience pointed out can be avoided. The words of the will do not require an immediate distribution.

With respect to the case of *Hughes* v. *Hughes* [3 Bro. C. C. 434], it appeared to me at first, that though the language of the court in giving judgment was in favor of the view I take of the case, the decree as drawn up was different. It is not, however, different, for it lets in all the children, — whether it means children *in esse* or children at any time born of the daughter, I do not know. It is not now the practice of the court to make a prospective decree; but the decree is open to

the construction, that every child of the daughter shall take a distributive share. I see no principle upon which a distribution can be demanded in the case before me, merely because the youngest grandchild *in esse* has attained twenty-one.[1]

CABLE *v.* CABLE.

CHANCERY. 1853.

[*Reported* 16 *Beav.* 507.]

WILLIAM CABLE, by his will, dated in 1829, gave his residuary estate and effects to his executors, upon trust to invest and pay the interest, &c. to his wife, Maria Cable, for life, and after her decease, to assign it to his children living at his decease. But in case he should have no child at his death [which happened], "*then* and in such case, he directed, that the said stocks, funds, &c. should, from and immediately after his wife's decease, become the property of the person or persons, who should *then* become entitled to take out administration to his effects, as his personal representative or representatives, according to the provision of the Statute for the distribution of intestates' effects, and in the proportion pointed out by the said Statute, in case he had died intestate and unmarried."

The testator died in 1832 without having any child; his wife survived and died in 1851.

On her death, a question arose, whether under the ultimate limitation in the testator's will, the next of kin at his death, or his next of kin at the death of the tenant for life, were entitled to the residue.

It appeared, that at the death of the testator, his father, Thomas Cable, was living, and was his sole next of kin. He died in May, 1840, and in 1851, at the death of the widow, the nephews and nieces of the testator were his next of kin.

Mr. Taylor and *Mr. Collins*, for the plaintiff.

Mr. Anderson, for Robert Cable, the administrator *de bonis non* of the testator.

Mr. Lloyd and *Mr. Rasch*, for defendants who took the same view as the plaintiff.

Mr. R. Palmer and *Mr. Freeling*, for other defendants.

THE MASTER OF THE ROLLS. [SIR JOHN ROMILLY.] There is more obscurity in this case than in *Gundry* v. *Pinniger* [14 Beav. 94; 1 De G. M. & G. 502], and the other cases cited; but the safe rule in construing a will is, to adhere, if possible, to the established meaning of words. There is always a difficulty in fixing the death of the tenant for life as the period at which the next of kin of a testator are to be determined, for in so construing it, you must introduce the words, "if

[1] See *Armitage* v. *Williams*, 27 Beav. 346 (1859); s. c. 7 W. R. 650.

the testator had died then;" that is, the sentence must run thus: "to my next of kin, as if I had died at the same time as the tenant for life." I am of opinion, that the word "then" must be construed as an adverb representing an event, and not as an adverb of time; that is, it means "thereupon," and the fund is "thereupon, or in that event, to be distributed in the proportions directed by the Statute, as if I had died intestate and unmarried." If I do not so construe the sentence, there is a contradiction between the two members of it; but this construction renders the whole intelligible and clear, whereas if the other be adopted, the fund could not be divided in the same proportions as directed by the Statute. This construction has also the advantage of attributing to the expression "next of kin" its natural signification, that is, next of kin at the death of the testator.

The word "unmarried" strengthens this construction, for it seems introduced to exclude the widow, who was otherwise provided for, and would, but for this, be entitled, under the Statute, at the death of the testator, but not at her own death.[1]

[1] Cf. *Doe* d. *Garner* v. *Lawson*, 3 East, 278 (1803); *Wheeler* v. *Addams*, 17 Beav. 417 (1853); *Bullock* v. *Downes*, 9 H. L. C. 1 (1860); *Mortimer* v. *Slater*, 7 Ch. Div. 322 (1877); s. c. *sub nom. Mortimore* v. *Mortimore*, 4 Ap. Cas. 448 (1879); *Dove* v. *Torr*, 128 Mass. 38 (1879).

CHAPTER XI.

POWERS.

SECTION I.

OPERATION AND EXTINGUISHMENT.

ALBANY'S CASE.

QUEEN'S BENCH. 1586.

[*Reported* 1 *Co.* 110 *b.*]

IN trespass brought by John Grendon, plaintiff, against Thomas Albany, defendant, for a trespass committed in 20 acres of land in W. in the county of Middlesex; the defendant, as to five acres, pleaded, that Francis Bunny, 1 Maii 20 Eliz. by deed indented, did enfeoff Miles Hitchcock to the use of the said Francis for life, and after to the use of one David Bunny in tail, and after to the use of one Walter Bunny in tail, and after to the use of Stephen Bunny in fee. And afterwards, viz. Maii 21 Eliz. the said Francis of the said five acres, in which, &c. did enfeoff one Richard Tompson in fee, upon whom the said David entered for the forfeiture. And afterwards, viz. 1 Maii 22 Eliz. demised the said five acres to Adam Blunt for twenty-one years; who enfeoffed the said Thomas Albany, the now defendant; and justified the trespass, and gave color to the plaintiff. And as to the said 15 acres residue, the defendant pleaded, that the said David so seised as aforesaid in tail, 2 Maii 22 Eliz. by deed indented and enrolled in Chancery, according to the Statute, did bargain and sell the said 15 acres to the said defendant in fee; and justified the trespass, and gave color to the plaintiff. The plaintiff replied and said, that in the said deed of feoffment of the said Francis Bunny, it was provided, that if it should happen that one Peter Penruddock should die without issue male of his body, that it should be lawful for the said Francis at all times at his pleasure, during his life, by his deed indented to be sealed and delivered in the presence of four honest and credible witnesses at the least, to alter, change, determine, diminish, or amplify any use or uses, limitations, intents, or purposes limited or appointed in or by the said deed of feoffment, or the use of any parcel of the premises. And afterwards 1 Maii anno 23, the said Peter Penruddock

died without issue male; and after, that is to say, 20 Martii, 24 Eliz. the said Francis by indenture between him and the said David Bunny, and sealed and delivered in the presence of four honest and credible witnesses (naming their names as he ought) did alter the uses in the said deed contained: and further covenanted and agreed with the said David that forever after Miles Hitchcock and his heirs, &c. should stand seised of the said 20 acres to the use of the plaintiff in fee; as by the said indenture more fully appears; by force whereof he was seised, until the defendant did the trespass, *prout*, &c. The defendant rejoined and confessed, that in the said deed of feoffment there was such a proviso as the plaintiff, in his replication, hath alleged; but he said, that the said Francis Bunny, in the life-time of the said Peter Penruddock, sc. 1 Apr. 23 Eliz. by his deed did renounce, relinquish, and surrender to the said Miles, David, Nicholas, Walter, and Stephen, all such liberty, power, and authority of revocation, &c. which he had after the death of the said Peter without issue as aforesaid. And further the said Francis by the said deed did remise, release, and quitclaim to them the said condition, proviso, covenant, and agreement aforesaid, and all his power, liberty, and authority aforesaid. And further the said Francis by the same deed granted to them and their heirs, that forever after, as well the said condition, proviso, covenant, and agreement, as the said power, liberty, and authority, should cease, and be to all intents void, &c. Upon which rejoinder, the plaintiff did demur in law. And *Altham*, and others, of counsel with the plaintiff, did argue, that a fine, or feoffment, could not extinguish such liberty or power; *a fortiori* a release could not extinguish it; for a fine, or feoffment, hath power and force to exclude the party from all rights and titles to the land, as well present as future; but an authority, or power, which is collateral to the right and title of the land, cannot be given or extinguished by fine or feoffment; neither can he thereby disable himself to make an estate according to his authority and power, when it comes *in esse*. As in 15 Hen. 7, fol. 1, b, where *cestui que use* devised, that his feoffees should sell his land, and died, and afterwards his feoffees made a feoffment over; yet the feoffees might sell against their own feoffment, because the power to sell was merely collateral to the right of the land.

And so, if executors have power to sell land to J. S. and they enter and disseise the heir, and enfeoff a stranger; yet they may sell to J. S., for the reason before. And it was resembled to the case of tithes in 42 Edw. 3, 13, a, where it is held, that a prior parson imparsonee shall have tithes against his own feoffment, because he doth not claim them in respect of the ownership of the land, or any right or title therein, but as tithes, in respect that he is parson by collateral means. And 12 (2) Ass. plac. 41, pending a *præcipe*, the tenant makes a feoffment, and afterwards an erroneous judgment is given against him, yet he shall have a writ of error against his own feoffment, for the error is collateral to the right of the land; *a fortiori*, in case of a release, for

that which should be released is but a possibility, which cannot be released. And a diversity was taken between a condition precedent, and a condition subsequent; for a condition subsequent, before the breach thereof, may be released, for there the estate passeth, and the condition is annexed to that which may be released. But in the case of a condition precedent, there is but a possibility; as if I grant to you, that if you do such an act you shall have an annuity of £20 per ann. during your life, and before the performance of the condition, you release the annuity to me, the release is void, because the release cannot extinguish a possibility. The case of Littleton, chapter Release 105, where the son releaseth in the life of his father, the release is void. And 40 Edw. 3, 22, a future duty as a relief, &c. is not released by this word *demand*, 18 Edw. 3, fol. 26, a, & titulo Avowry 99.

And on the other side it was argued by one of the Inner Temple; and as to the first point he said, that a fine or feoffment may utterly extinguish the said power and authority, so that the feoffor had disabled himself to execute it when it came *in esse*. And therefore the case, by way of admittance, is no other in effect, but that A. enfeoffs B. to the use of A. himself for life, and after to the use of B. in tail, and after to the use of C. in fee, with proviso and liberty to revoke the uses, and to limit new uses, if A. survive B. and afterwards A. makes a feoffment, and after B. dies; whether A. may limit new uses against his own feoffment is the question; and he conceived, he could not. And first he said, that a livery is of such force that it gives and excludes the feoffor not only from all present rights, but from all future rights and titles. Also, as the books are, in the case of tenant by the courtesy in 9 Hen. 7, fol. 1, b, and in the case of an intruder, and recovery in a writ of deceit, in 9 Hen. 7, 24, b, and in the case where the son disseised the father, and made a feoffment, in 39 Hen. 6, 43, a; and in all actions which are in a manner collateral to the land, as 34 Hen. 6, 44, a, the case of attaint, 38 Edw. 3, 16, b, the case of deceit, in those cases those actions are extinguished by a feoffment of the land, and yet they are collateral to the right of the land, by which no land is demanded, but are only to reform the erroneous proceeding, the false oath, and false return of the sheriff, &c., but because by a mean, the possession and inheritance of the land would be also removed and devested by them, for that reason by a feoffment of the land, those actions are gone.

So in the case at bar, although this power to revoke the former uses and estates, and to limit a new use is not properly any interest or right in the land, yet it is a mean by which the possession and right of the land shall be altered and devested out of a third person. Also it is clear, that a future use shall be given inclusively in the livery, as 27 Hen. 8, 29, b, and in *Delamer's Case*, Plow. Com.; and then if a future right, a future action, which is collateral to the right of the land, and a future use shall be given and extinguished in the livery of the land; so it was said, shall it be in the case at the bar; for let us

examine the case by parcels, and suppose that in the case above, the proviso had been only, that if A. survive B. that then he might revoke the former uses, without more, it was clear, that after the said feoffment he could not revoke, for then he would have the land again against his own feoffment, which would be against all reason, and against all the books aforesaid.

Then, in the case at bar, the proviso goes further, *scil.* that he may alter, change, &c. Suppose then that he had power to revoke the ancient uses, and power to limit new uses to a stranger, how should the stranger have this new use? Certainly by force of the first feoffment made by the said A., for out of that all the present and future uses also arise. And so the stranger shall have this use in a manner by the said A. against his own later feoffment and livery, which for the reasons aforesaid cannot be. And it was said that the book in 15 Hen. 7, 11 b, which hath been cited on the other side, is not to be compared to this case, for two reasons: one, because there the feoffees having power to sell, as is aforesaid, made a feoffment over to the first uses, for so is the book, and then notwithstanding their feoffment they might sell as much as the testator could devise, and that was the use. The second reason is, because when the feoffees sell the use, the vendee is in by the devise of *cestui que use;* as in the case of executors who have power to sell, their vendee shall be in by the testator and not by them; but in the case at bar, the new *cestui que use*, as hath been said before, would be in [in] a manner by the feoffor; for the feoffor in case of an estate-tail limited in use shall be supposed donor. And as to the case 12 Ass. 41, of Error, he said, that the feoffment cannot bar him of the writ of error, because notwithstanding his feoffment he remains tenant as to the demandant, and shall plead all pleas which the tenant might plead, and notwithstanding that shall be received, &c. and judgment given against him as tenant; wherefore upon such judgment given against him after his feoffment he shall have a writ of error; but if after the judgment given he makes a feoffment, he shall never have a writ of error, nor an attaint; and therefore the reason is not in the case of 12 Ass. as hath been urged, that the feoffment doth not extinguish it, because it is collateral to the right of the land, for then by the same reason his feoffment after judgment given should not extinguish it; wherefore it seemed to him, that a fine or feoffment may extinguish the said future power. And of such opinion, upon conference had with the Lord Anderson and other justices, was Wray, Chief Justice of England, and all the Court of King's Bench, that is to say, that the said power as well to revoke, as to limit new uses, may be utterly gone or extinguished either by a fine or feoffment. And as to the second point, he conceived, that the said future power might be released, for it may be resembled to a condition subsequent, although the performance or breach thereof cannot be done without an act precedent; as if A. enfeoff B. and his heirs upon condition, that if B. survive C. if then A. or his heirs pay to B. his heirs or assigns 40*s.*,

that then he and his heirs shall re-enter; in that case, it is a condition subsequent, and although it cannot be performed but upon a contingency, yet is the inheritance in him, and shall descend to his heir, and therefore may be released, and his heir by his release may be barred. And therefore if a man makes a feoffment in fee with warranty, in that case before he can vouch, he ought to be impleaded, so that the voucher depends upon an act uncertain, that is to say, that he shall be impleaded in a real action by a stranger; yet by a release of all demands, Littleton in his chapter of Warranty, fol. 171, saith, that the warranty is extinguished, for it is an inheritance in law, and may descend to the heir, and by consequence may be released.

Also, if a man covenants to do a collateral act, in that case before the breach of it, a release of all actions, suits, and quarrels, is nothing worth, for before the breach of it, there is not any duty, nor cause of action, but the breach ought to precede, as it was adjudged, Tr. 4 Eliz. Rot. 1027, *in Communi Banco*. But in the same case a release of all covenants will bar it, as it is said in 35 Hen. 8, 56, 57, Dyer; for by his death the law transfers it to his executor, and by consequence he may release it. And 16 Edw. 3, Fitz. Barre. 145, a woman hath title of dower of land, whereof one is tenant for life, the reversion to another in fee, and the woman releases to him in the reversion, it is a good bar in a writ of dower against tenant for life; and yet at the same time she had no present cause of action against him, but *in futuro* after the death of tenant for life. So 21 Hen. 7, 41, a, a release of an annuity to the patron in time of vacation is good, yet no action lies against him, nor against any other till a successor be made; and yet a release will extinguish it. And suppose in the case at bar, that the power of revocation upon the said contingency had been reserved to the feoffor and his heirs, without doubt it was inheritance in him, and should descend to his heir, and by consequence his release shall extinguish it; but as to that point, the court gave no resolution: but it was agreed *per totam curiam*, that if the power of revocation had been present, as the usual provisos of revocation are, that it might be extinguished by release, made by him who had such power, to any who had an estate of freehold in the land in possession, reversion, or remainder; and thereby the estates which were before defeasible by the proviso, are by such release made absolute.

And he moved another point, that if it was admitted, that the said future power could not be released, yet as well the power as the proviso and covenant might by the said words of defeasance be defeated, for both are executory, *scil.* the power itself, which was created by the said covenant and proviso, which, &c.; and as the proviso and covenant itself commenced by deed, so by deed they may be annulled and defeated. And it was said, that in all cases, when anything executory is created by a deed, that the same thing, by consent of all persons who were parties to the creation of it, might by their deed be defeated and annulled. And therefore it was said, that warranties, recogni-

zances, rents, charges, annuities, covenants, leases for years, uses at the common law, and such like, may, by a defeasance made with the mutual consent of all those who were parties to the creation of them, be by deed annulled, discharged, and defeated; for it was said, it would be strange and unreasonable, that a thing which is created by the act of the parties, should not by their act with their mutual consent be dissolved again. And of such opinion also was Wray, Chief Justice, and the whole court, *scil.* that by the said defeasance as well the said covenant which created the said power, as the power itself created thereby, was utterly defeated and annulled; and according to their resolution judgment for the causes aforesaid was given, *quod quærens nil capiat per billam.*[1]

SIR EDWARD CLERE'S CASE.

Queen's Bench. 1599.

[*Reported* 6 *Co.* 17 *b.*]

In an assize by Parker against Sir Edward Clere, Knight, of lands in the county of Norfolk, the case in effect was such. Clement Harwood seised of three acres of land, each of equal value, held *in capite*, made a feoffment in fee of two of them to the use of his wife for her life, for her jointure, and afterwards made a feoffment by deed of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last will in writing, and afterwards by his last will in writing, he devised the said third acre to one in fee (under whom the plaintiff claimed). And whether this devise was good for all the said third acre, or not, or for two parts of it, or void for the whole, was the question. And in those cases four points were resolved by Popham, Chief Justice, and Baron Clark, Jus-

[1] "Powers to raise estates are either simply collateral (as where a party that has such power has not, nor ever had any estate in the land: as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is no more than a bare nomination) or not simply collateral: and these latter are of two sorts. First, appendant and annexed to the estate; secondly, in gross. A power of the first sort is, where tenant for life has a power to make leases for one and twenty years or three lives: such a power is not simply collateral. For if such a tenant charge the land with a rent, and then execute his power, the charge shall not be defeated whilst he lives, Latch's Rep. So if he had before covenanted to stand seised to the use of another; because the power in that case is annexed to the estate. But where the power does not fall within the estate, as here the tenant for life has a power to make an estate, which is not to begin till after his own estate determined, such power is not appendant or annexed to the land, but is a power in gross; because the estate for life has no concern in it. And yet such a power may by apt words be destroyed by release, or by a fine or feoffment, which carry away, and include all things relating to the land: but an assignment of *totum statum suum*, or other alteration of the estate for life, does not affect such a power; because it is a power in gross." — *Per* Hale, C. B., in *Edwards* v. *Slocter*, Hardr. 410, 415, 416 (1665).

tices of Assize of the said county, upon conference had with the other Justices: 1. If a man seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates as he shall appoint by his will, that by operation of law the use doth vest in the feoffor, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. *Vide* Lit. fol. 109 a. When a man makes a feoffment to the use of his last will, he has the use in the mean time. 2. If in such case the feoffor by his will limits estates according to his power reserved to him on the feoffment, there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory: but if in such case the feoffor by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would; and when he devised the land itself without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land, by his will, and not to limit an use according to his authority; and in such case the land being held *in capite*, the devise is good for two parts, and void for the third part. For as the owner of the land he cannot dispose of more; and in such case the devise cannot take effect by the will for two parts, and by the feoffment for the third part: for he made his devise as owner, and not according to his authority, and his devise shall be of as much validity as the will of every other owner having any land held *in capite*. 3. If a man makes a feoffment in fee of lands held *in capite*, to the use of his last will, although he devises the land with reference to the feoffment, yet the will is void for a third part: for a feoffment to the use of his will, and to the use of him and his heirs is all one. 4. In the case at bar, when Clement Harwood had conveyed two parts to the use of his wife by act executed, he could not as owner of the land devise any part of the residue by his will, so that he had no power to devise any part thereof as owner of the land, and because he had not elected as in the case put before, either to limit it according to his power, or to devise it as owner of the land (for in the case at bar, having, as owner of the land, conveyed two parts to the use of his wife *ut supra*) he could not make any devise (thereof) therefore the devise ought of necessity to enure as a limitation of an use, or otherwise the devise shall be utterly void; and judgment was given accordingly for the plaintiff for the whole land so devised. And afterwards on the said judgment Sir Edward Clere brought a writ of error in the King's Bench, *sed non prævaluit*, but the judgment was affirmed.[1]

[1] See Lord Eldon's remarks in *Maundrell* v. *Maundrell*, 10 Ves. 246, 254 *et seq.* (1804), 263 *et seq.* (1805), *accord.*, disapproving *Goodill* v. *Brigham*, 1 B. & P. 192 (1798).

WHITLOCK'S CASE.

COMMON PLEAS. 1609.

[*Reported* 8 *Co.* 69 *b.*]

IN a replevin between John Chappel, plaintiff, and William Whitlock, defendant, for taking of a gelding in Ring's Ash, in the county of Devon, in a place called Cunny park; the defendant avowed the taking in the place where, &c. as in his freehold, for damage feasant. The plaintiff in bar of the avowry pleaded, that one William Whitlock the elder was seised of a messuage, 20 acres of land, 12 acres of wood, and 20 acres of heath, in Ring's Ash aforesaid in fee, whereof the place where is parcel, and demised the said tenements to one John Bullhead for his life, by force whereof he was seised for life, the reversion expectant to the said William Whitlock the elder; and the said William Whitlock the elder, 11 Martii, 18 Eliz. by his indenture tripartite, in consideration of a marriage to be solemnized between William Whitlock the younger, and Margaret, daughter of John Bolter, covenanted and agreed by the said indentures, that the said William Whitlock the elder, before the feast of the birth of Christ next ensuing, would assure and convey to Leonard Yeo, and Anthony Whitlock, and their heirs, the tenements aforesaid, to the uses, intents, and purposes expressed and declared in the said indentures, and to no other uses or intents, *viz.* till the said marriage to the use of the said William Whitlock, the elder, and his heirs; and after the said marriage, to the use of William Whitlock the elder for his life, without impeachment of waste, and afterwards to the use of the said William Whitlock, the younger and the heirs of his body, and afterwards to the use of J. Whitlock and his heirs: "Et per eand' indenturam ulterius provisum, concessum et agreatum fuit, quod liceret et licitum foret præd' Will' Whitlock, sen. ad aliquod temp' extunc facere dimissionem, (Anglice *lease*) sive dimissiones, concessionem sive concessiones, tam in possessione quam in reversione de tenementis præd' cum pertin', unde, &c. inter alia, sive de aliqua parte inde. Proviso semper quod præd' dimissio sive dimissiones, concessio sive concessiones non excederent super numerum trium vitarum ad majus vel viginti et unius annorum, et ita quod super quamlibet talem dimissionem et dimissiones, concessionem et concessiones, maxime antiq' et consuet' annual' reddit', heriot' et servitia sive plus redderentur et reservarentur, solubil' duran' dict' dimissione sive dimissionibus, concessione sive concessionibus;" and that the said Leonard and Anthony, and their heirs, should stand seised, &c. to the use of every such fermor, &c. and afterwards 18 Maii, 18 Eliz. the said William the younger, and Margaret, intermarried; and afterwards,

Trin. 18 Eliz. William Whitlock the elder levied a fine of the tenements aforesaid, according to the same indentures, to the uses therein contained, by force whereof, and of the Statute of Uses, the said William Whitlock the elder was seised of the reversion of the said tenements, &c. for his life, the remainder over according to the said indentures. And the said William Whitlock the elder so seised, 1 Sept. 31 Eliz. "dimisit cuidam Christian' Hearne tenem' præd' cum pertin' unde, &c. inter alia habend' et occup' eidem Christianæ et assignat' suis pro term' 99 annor' plenarie complend' et finiend', si præd' Christiana et quid' Petr' Rattenbury, sive eorum alter, tam diu vivere contingeret;" the same term to commence after the death or determination of the estate of the said John Bullhead, "reddendo et solvendo pro inde annuatim post inceptionem dictæ dimissionis, præfato Will' Whitlock, sen. hæred' et assign' suis et tali personæ et personis quib' hæreditament' præmissorum post mortem præd' Will' Whitlock, sen. de jure spectaret seu pertineret durante dicto termino 14s. ad quatuor maxime usualia festa annuatim solvendo, &c." And the plaintiff justified under the said lease, and averred the life of the said Peter Rattenbury, and that the most ancient and accustomed yearly rents, heriot, and services, &c. were reserved, &c. upon which the avowant did demur in law. And in this case two questions were moved, — 1. Whether William Whitlock the elder had pursued his authority or not, in making the said lease for 99 years, determinable on the said two lives? 2. Whether the said reservation of the rent was according to the said "Ita quod," &c. And as to the first it was objected, that the authority was distinct, *sc.* either to make a lease not exceeding the number of three lives, or for twenty-one years, by which it appears that the intention was either to make a lease for three lives, &c. or if he would make a lease for years, that it ought to be for twenty-one years; but in the case at bar, the lease is not for three lives, &c. nor for twenty-one years, but for ninety-nine years, if two or either of them shall so long live, and so his authority not pursued. And if one hath power to make a lease for three lives, he cannot make a lease for ninety-nine years determinable upon three lives, &c. "quod fuit concessum per totam curiam." But it was answered and resolved by the court, that in the case at bar the lease was good, and the power which the lessor had was well pursued: for the proviso of creation of his power to make leases is in the beginning absolute, affirmative, and indefinite, *scil.* to make a lease or leases, grant or grants, &c. as well in possession as in reversion of the tenements, or any parcel thereof, &c. which is without any limitation. Then the proviso of correction is added, *scil.* so that such lease or leases, grant or grants, shall not exceed the number of three lives at most, or twenty-one years, which clause is negative, and qualifies the generality of the first proviso: so that the power by the first is general, and by the second the lease ought not to exceed three lives, &c. And when the lease is made for ninety-nine years determinable upon two lives, it doth not exceed the number of three lives, although in truth it

is not a lease for lives. 2. The power is to make leases as well in possession as reversion, with the limitation aforesaid; and a lease for three lives cannot be made in reversion, but a lease for years determinable upon lives may, and the lessor himself had but a reversion expectant on an estate for life at the time of the creation of the said power: so that the intention of the parties was (not) to make a lease for years absolutely for twenty-one years; but any term of years determinable upon three lives, &c. which is in equipage with twenty-one years, he well might. And the difference was taken and agreed between a particular power affirmative, and a general power restrained with a negative; for it is true, that if one hath power to make a lease for three lives, or twenty-one years, he cannot make a lease for ninety-nine, if three shall so long live, &c. but if he has power to make any lease or grant, provided such lease or grant shall not exceed the number of three lives, or twenty-one years, there he may make a lease for ninety-nine years, if three shall so long live, for that doth not exceed the number of three lives, but in truth is less; for every term for years, which is but a chattel, is less, in estimation of law, than an estate for life, which is a freehold. As to the second point, it was objected, that the said reservation was such, that it was not payable during the said lease, as it ought, but only during the life of the lessor; for he having but an estate for life, reserved the rent to him and his heirs, and his heirs cannot have it, and the latter words, *scil.* to such person and persons who have the inheritance of the premises, &c. are merely void; for no rent can be reserved but to the lessor, donor, or feoffor, and his heirs, who are privies in blood, and not to any who is privy in estate, as to him in reservation, remainder, &c. But it was resolved, that the reversion in the case at bar is good. For the said lease hath not its essence from the estate of the lessor, which he hath for life; but the lease hath its essence out of the said fine, and in construction of law precedes the estate for life and all the remainders; for after the lease made, it is as much as if the use had been limited originally to the lessee for the said term, and then the other limitations in construction of law follow it: and that is the reason that the usual clause in such indentures is, that the conusees and their heirs shall stand seised to the use of such lessees, &c. So that the lessee, in the case at bar, derives his estate out of the estate which passed by the fine. Then, when the lessor reserves rent to him and his heirs, it is good; for that by construction of law precedes the limitations of the uses; and then it being well reserved, it is well transferred to every one to whom any use is limited. So if the reservation be to the lessor, and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good; for the law will distribute it to every one to whom any limitation of the use shall be made. And in such case no rent is reserved to a stranger; for the reservation precedes the limitation of the uses to strangers. But it was agreed, that the most clear and sure way was to reserve rent yearly during the term,

and leave the law to make the distribution, without an express reservation to any person. But it was resolved, that all the said three several ways were good enough and effectual in law.[1]

TALBOT *v.* TIPPER.

King's Bench. 1694.

[*Reported Skin.* 427.]

In ejectment the case was, Sir John Fortescue seised in fee, by lease and release, settles the lands in question, to the use of himself for life, and then to trustees for ninety-nine years, if A. B. shall so long live, upon such trusts, etc., as he shall direct, and after to the first son of J. F., &c., with power to make leases, with fine or without fine, *and rendering such rents and services, as he shall think fit;* after this he by another deed declares the trusts of the term, and after this he makes a lease without rendering rent to Talbot, who was the lessor of the plaintiff. To this two objections were made: first, that he having declared the trust of the term for payment of his debts, the estate is bound by it, and he may not execute his power to make leases after; *non allocatur;* for the term was originally subject to the power, being contained in the same deed; and he having executed his power, the leases are precedent to the term, and control it. Secondly, it was objected, that here no rent was reserved upon the lease, and some rent ought to be reserved, and there not being any, his power is not well executed; *non allocatur;* for it being to reserve such rent, as he shall think fit, and he having thought fit to reserve no rent, this shall not avoid the execution of the power, and especially he not having said *such yearly rent;* so that a peppercorn reserved, payable forty years after, had been sufficient; and therefore such matter should not be regarded as a cause sufficient to avoid the lease, where he had made it subject to a trust to pay the rents, issues and profits, to such person as he shall direct; and so the Court ruled and directed the jury to find for the plaintiff.

ROACH *v.* WADHAM.

King's Bench. 1805.

[*Reported* 6 *East*, 289.]

Lord Ellenborough, C. J.,[2] then said, this is a conveyance with a double aspect, having words which indicate an intention to pass an interest and to limit an use, and to be taken either as a conveyance or

[1] See *Greenaway* v. *Hart*, 14 C. B. 340 (1854); *Yellowly* v. *Gower*, 11 Ex. 274 (1855).

[2] Only the opinion is here given.

as an appointment. We will therefore look into the deeds and see which is the predominant intention. And afterwards his Lordship delivered the opinion of the court. The short statement of these cases is as follows. By certain indentures of lease and release, dated the 23d and 24th of June, 1791, the release being made between John Russ of the first part, the plaintiffs of the second part, Rachel wife of John Punter of the third part, Wm. Watts of the fourth part, and Thomas Coates of the fifth part; Russ, who was seised of one undivided third part of a certain messuage and lands, and the plaintiffs who were seised of the two other undivided third parts thereof, according to their respective interests, conveyed the same to Coates, his heirs and assigns, *habendum* to him, his heirs, and assigns, *to the use* of such persons and for such estates as William Watts by any deed attested by two credible witnesses, or by his last will, should *limit, direct, or appoint;* and for want of such limitation, to the only proper use and behoof of William Watts, his heirs and assigns forever: yielding and paying to the plaintiffs, their heirs and assigns forever, the yearly fee farm rent or rent charge of £28 on certain days therein mentioned: which rent William Watts for himself, his heirs, *and assigns*, covenanted to pay to the plaintiffs, their heirs and assigns, on the days and times mentioned in the deed. And by the deed a rent charge of £14 is in like manner reserved to Russ, who was seised of the other undivided third part. And there are powers of distress and re-entry for non-payment. By indentures of lease and release, dated respectively the 25th and 26th of September, 1792; the release being made between the said William Watts of the first part, James Shoopholme of the second part, the said Thomas Coates of the third part, the defendant's testator, John Wadham, and one Thomas Stevens, of the fourth part, and Joseph Powell, a trustee to bar dower, of the fifth part, and other persons whom it is not necessary to state; for certain considerations therein mentioned the said Coates, *by the direction of Watts*, did, according to his estate and interest, *bargain, sell, and release*, and the said Watts *did grant*, bargain, sell, and release, ratify and confirm, and also *limit, direct, and appoint*, unto the said Wadham the testator, Stevens, and Powell, and to their heirs and assigns forever, the said messuage and land to hold to them in fee as tenants in common: subject nevertheless to the payment of the said yearly fee-farm rents of £42 and to the performance of the covenants in the indenture of the 23d and 24th of June, 1791, on the part and behalf of the said William Watts, his heirs and assigns to be observed and performed. And the said Wadham and Stevens did, by the said indenture of 1792, covenant with William Watts, his heirs and assigns, in equal shares and proportions, to pay the fee-farm rents of £42, and perform, fulfil, and keep all and every the covenants, clauses, provisos, and agreements, contained in the said indenture of 1791, which by Watts, his heirs and assigns, ought to be performed or fulfilled; and to keep the said Watts, his heirs, executors, and administrators, indemnified and saved harmless from all damages on account of the same

rent and covenants. Wadham, the testator, afterwards made his will, by which he made the defendant his sole devisee and executor, and died without revoking it. The defendant proved the will; and afterwards one moiety of the said rent of £28 for three years, amounting to £42, became due to the plaintiffs, to recover which the present actions, one against the defendant charging him as assignee, and the other against him in his character of executor to Wadham the testator, were brought; and they were referred to Mr. Puller, who by his award, dated the 31st of May, 1802, determined that the defendant was not liable in either of the actions; John Wadham the elder being in his opinion, as appointee of the estate of Wm. Watts, not liable in law upon the covenants made by the said Wm. Watts. Mr. Puller, having stated the indentures of 1791 and 1792 at large in his award, has given the plaintiffs an opportunity of taking the opinion of the court upon the propriety of his decision, by a motion to set his award aside. It was admitted by the counsel for the defendant that the conveyance to Watts vested in him an estate in fee simple, liable to be devested by an exercise of the power of appointment, (and which he contended had been done;) and though the plaintiffs' counsel at first insisted that the power was nugatory, and that the conveyance *necessarily operated on the interest of Watts;* yet he afterwards abandoned that ground in his reply, and agreed that the only point was, whether the conveyance operated on the interest which Watts had, or as an execution of the power; and that it was a question of mere *intention.* And if that be so, it ought to appear very clearly that the covenants and provisions in the deeds cannot take effect, if the conveyance should be holden to operate as an appointment, in order to authorize the court so to determine, where the instrument in its terms professes to make an appointment, and where *Coates, the trustee, joins in the conveyance*, and by the direction of Watts *bargains, sells, and releases* to Wadham. Had it been the intention of the parties that the estate which Wadham was to take should be derived *out of the interest* which Watts had, it would have been wholly unnecessary that Coates should have been a party to the deed: his being made a party to it shows that *something* was to be taken by way of appointment; and if anything, there is nothing from whence there can be collected an intention that *less than the whole* should pass by those means: the reason for which is obvious; as it might prevent such objections to the title as might be made if it were derived immediately from Watts. The covenants in the deed of 1792 do not appear to us at all to militate with this construction; for had it been the intention of the parties that Wadham should take as the assignee of Watts, such covenant on the part of Wadham would have been less necessary than if he were intended to take as appointee: for in the former case Watts would have had some security that he would not be called upon to pay this rent, arising from the circumstance of Wadham's being liable to be sued by Roach. But, whether the conveyance were intended to operate in the one way or the other, these covenants

were fit and proper for the security of Watts; for if Wadham were the assignee and liable to be sued in covenant, Roach, if Wadham did not pay the rent, might sue Watts, on his covenant to pay it; and in that case Wadham's covenant was proper for Watts' indemnity: and, if Wadham were not liable to be sued by Roach, and it was nevertheless the intention of the parties that Wadham should pay the rent, a covenant from him to Watts to pay such rent and to indemnify Watts therefrom became the more necessary. The making Watts join in the lease and release of 25th and 26th September, 1792, as a party conveying, proceeded, as we conceive, only from the common caution of conveyancers, who, where a man has a power of appointment over land as well as an interest in it, make him both appoint and convey, in order that if there should be any defect in the creation, continuance, or execution of the power, the conveyance may operate upon his estate and interest. For these reasons we are of opinion that the award of Mr. Puller is right, and that the rule for setting it aside must be discharged.

Rule discharged.

Dampier, for the plaintiffs.
Abbott, contra.

WEST *v.* BERNEY.

CHANCERY. 1819.

[*Reported* 1 *Russ. & M.* 431.]

IN this case the master had reported that a good title was shown; and exceptions were taken to the report. The question arose on the following instruments: —

Sir John Berney, being seised in fee under a settlement made in 1789, conveyed the estate to the use of himself for life; remainder to such one or more of his sons as he should appoint; remainder, in default of appointment, to his first and other sons in tail; remainder to himself in fee.

In 1811, on the occasion of the marriage of his eldest son, Sir John Berney was a party to a deed of settlement, to which the intended wife was also a party, and to a fine and recovery levied and suffered in pursuance thereof, whereby the estate was limited to the use of Sir John Berney for life; remainder to the use of Hanson Berney, his eldest son, for life; remainder to the first and other sons of Hanson Berney in tail, with divers remainders over. And in this deed a power was given to the trustees, authorizing them, at the request of Sir John Berney during his life, and, after his death, at the request of Hanson Berney, to sell the estate; and, after paying the encumbrances to which it was at this time subject, to invest the produce in the purchase of other estates to be settled to the same uses.

Sir John Berney had not previously executed any appointment in favor of his eldest son; and a doubt occurring whether he might not

still execute his appointment in favor of any other son, and so defeat the settlement, he, in 1815, executed a deed of appointment in favor of the eldest son in fee, reciting, that it was for the purpose of confirming the marriage settlement of 1811.

Against the title, it was urged by *Mr. Preston*, that the power of appointment in the deed of 1789 was merely collateral, and, being for the benefit of particular objects, was an interest in them, and in the nature of a trust in Sir John Berney, and, therefore, could neither be released nor extinguished by him; that the power of appointment remained in him, therefore, notwithstanding the settlement of 1811; and that it was not well executed by the deed of 1815, because the eldest son was not capable of receiving an interest in the estate inconsistent with the settlement of 1811. He cited Co. Lit. 237 a, 265 b, *Albany's Case*, 1 Rep. 111, and *Digges's Case*, 1 Rep. 175.

Mr. Sugden, who was also against the title, differed altogether in his argument from *Mr. Preston*. He admitted that the power was extinguished by the settlement of 1811; but insisted upon the form of the pleadings, that a good title could be made only for a certain term of 500 years, under which the plaintiffs claimed. He relied upon *Albany's Case* and *Digges's Case;* and cited also *Leigh* v. *Winter*, Sir W. Jones, 411; *Bird* v. *Christopher*, Stiles, 389; *Edwards* v. *Sleater*, Hardres, 410; *King* v. *Melling*, 1 Vent. 225; *Tomlinson* v. *Dighton*, 1 P. Wms. 149; *Saville* v. *Blacket*, 1 P. Wms. 777; *Morse* v. *Faulkner*, 1 Anstr. 11, 3 Swanst. 429, n.

The Vice-Chancellor. (Sir John Leach.) In *Albany's Case* it was held, that the reserved power of the grantor may be extinguished by his release. He took in the settlement an estate for life.

In *Digges's Case* it was held, that the reserved power of the grantor, who took by the deed also an estate for life, being to be executed by deed indented and enrolled, was extinguished by his fine levied after a revocation, but before enrolment.

In *Leigh* v. *Winter* it was held that the grantor could release his reserved power of revocation. He took by the settlement an estate for life.

In *Bird* v. *Christopher* it was held that, if A. enfeoff with power of revocation, and afterwards levy a fine, the power is extinguished.

Edwards v. *Sleater* was cited for the able reasoning of Lord Hale upon the distinctions of powers; whose opinion seems to be, that where the party to execute the power has or had an estate in the land, it is not simply collateral; and whether it be appendant to his estate, as a leasing power, or unconnected with his particular estate, and therefore in gross, it may be destroyed by release, fine, or feoffment.

In *King* v. *Melling*, it was held that a power in the devisee for life to jointure his wife was extinguished by a recovery.

In *Tomlinson* v. *Dighton* it seems to be admitted, that where there is a devisee for life, with power to appoint to her children, the power would be extinguished by fine.

In *Saville* v. *Blacket* it was held that a tenant for ninety-nine years, if he should so long live, extinguished his power to charge the estate with a sum of money by joining in a recovery and re-settlement of the estate, because he would otherwise defeat his own grant.

In *Morse* v. *Faulkner*, A. sold a copyhold estate to which he had no title. It afterwards descended upon him, and he died. On a bill by the purchaser against his heir, the court was of opinion that the purchaser would have had a personal equity, but doubted whether it could reach his heir.

Upon the authorities and principle my opinion is, that a power simply collateral, that is, a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released, where it is to be exercised for the benefit of another.

It must be equally clear that it may be released, where it is for his own benefit, as a power to charge a sum of money for himself. In such case, his joining in a conveyance of the land clear of the charge, would be a release.

I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished. *Bird* v. *Christopher*. It differs altogether from a naked authority given to a mere stranger. It is so much reserved by him out of the estate.

I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore, in gross, may be extinguished. In respect of his freehold interest he can act upon the estate, and his dealing with the estate so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross in tenant for life would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power.

Quære. Could such a power in gross in a tenant for life be released? If he were grantor, it is decided by *Albany's Case* and *Leigh* v. *Winter* that it could be released; and I think it may equally be released, if he is grantee; because his release must be to him who takes subject to the power; and the exercise of the power would be inconsistent with the release, which is a species of conveyance affecting the land. *Sed quære.*

Mr. Preston admits all this reasoning as applied to general powers, but disputes it as to powers to appoint to particular objects, as children. Here, he says, the power is not an interest in the appointor but in the appointee, and is, therefore, in the nature of a trust, which the trustee cannot release or extinguish.

It is not a trust, because the alleged *cestui que trust* cannot call for

the execution of it. It may be exercised or not; and a dealing with the estate, inconsistent with the exercise of it, determines the option to exercise it. In *King* v. *Melling*, the power was a particular power.

But this reasoning would apply to a power simply collateral. The difference, however, is, that no act in the latter case can affect the land; whereas in the other, the interest of the person gives him the power to create an inconsistent estate in the land, though defeasible.

Mr. Preston urged the relief given against frauds upon the power; as in the case of an appointment by a father substantially to himself. This, however, does not prove the existence of a trust. It proves only that a power given for a particular purpose shall not by circuity be exercised for a different purpose.

It does not, upon the whole, appear to me to be a proper case to decide the general principle, that every power reserved by a grantor may be released or extinguished, although he reserved no other interest in the estate, — or the other principle, that every grantee for life with a power in gross may in like manner release or extinguish; although I was and am of opinion, that such two general principles are established. But I decide the case upon the ground that the settlement of 1811 was substantially and equitably an appointment by Sir J. Berney in favor of his eldest son, and that the limitations in the settlement were to be considered as limitations made by him.

SMITH *v.* DEATH.

CHANCERY. 1820.

[*Reported* 5 *Mad.* 371.]

THIS was a bill for the specific performance of a contract of sale. The master reported in favor of the title, and the case came on upon exceptions to his report. The plaintiff's title depended upon the will of Edward Wise, who devised the property in question to Charles Brown for life, with remainder to the use and behoof of such child and children of the body of the said Charles Brown, and him surviving, who should be brought up and educated as a member of the Established Church of England, and should be a constant frequenter or frequenters thereof, in such parts and proportions, etc., as he the said Charles Brown should by deed or will appoint; and in default of such appointment, to the use of the first son of the body of the said Charles Brown, lawfully begotten, who should be brought up and educated as aforesaid, and should be a constant frequenter of the said Church of England, and the heirs of the body of such son, with divers remainders over.

The first son of Charles Brown attained his majority in 1817, and soon afterwards joined with his father in suffering a recovery, under which the plaintiff claimed.

Mr. Sugden, in support of the exceptions.

Mr. Shadwell, contra.

The Vice-Chancellor [Sir John Leach] said, that in *West* v. *Berney* it appeared to him, as the result of the authorities, that every power reserved to a grantee or devisee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, might be extinguished. — That such a grantee or devisee could deal with the estate in respect of his freehold interest; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power, upon the general principle that a person is not permitted to defeat his own grant. — That it made no difference that here the power was a particular power in favor of children; that *King* v. *Melling*, 1 Ventr. 225, was a particular power in favor of the wife; that such a power could not be called a trust, for the alleged *cestui que trust* could not compel the execution of it, and being at the option of the grantee for life to exercise or not, any dealing with the estate inconsistent with its exercise must determine his option.

Exceptions overruled.[1]

DOE d. WIGAN *v.* JONES.

King's Bench. 1830.

[*Reported* 10 *B. & C.* 459.]

Lord Tenterden, C. J.[2] This was a special case, argued during the last term. It appeared by the case that in Michaelmas term 1822 a judgment was entered up against T. Baker at the suit of the defendant, who, on the 13th of December, 1827, sued out an *elegit*, under which the lands in question were delivered to him by the sheriff. In the mean time, between the entering up of the judgment and the execution of the *elegit*, viz. in November, 1826, the then defendant, Baker, had acquired these lands by a conveyance to such uses as he might appoint, and in the mean time to the use of himself for life, and so forth. In March, 1827, Baker mortgaged the estate for £4000 to the lessor of the plaintiff, and appointed the use to him for 500 years; and the question for the court was, Whether this conveyance, under the power of appointment, defeated the judgment-creditor? It has been established ever since the time of Lord Coke, that where a power is executed the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest which he may

[1] See, *accord.*, *Bickley* v. *Guest*, 1 Russ. & M. 440 (1830). Cf. *Hole* v. *Escott*, 2 Keen, 444; 4 Myl. & Cr. 187 (1838).

[2] The opinion only is here given.

do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party, for it is considered as a proceeding *in invitum*, and therefore falls within the rule. We are, therefore, of opinion that the nonsuit must be set aside, and a verdict entered for the plaintiff.

Postea to the plaintiff.

Preston, for the plaintiff.
Richmond, contra.

NOTE. — "*Morcton* v. *Lees*, C. P. Lancaster, March Ass. 1819. Case reserved and argued before LORD CHIEF BARON RICHARDS and MR. BARON WOOD, at Serjeants' Inn. The conveyance was by feoffment to the purchaser and his heirs, *habendum* to him, his heirs and assigns, to such uses as he should appoint by deed or will, and in default of and until appointment, to the use of the purchaser, his heirs and assigns. He exercised the power by an appointment in fee, and his wife brought an action to recover her dower. The objection was taken that the husband was in at the common law, and the power was void; but the contrary was decided, and the wife was held to be barred of dower. This decision, therefore, sets the point at rest. It has recently been followed by a case in Ireland. *Gorman* v. *Byrne*, 8 Ir. C. L. 394." — *Sugd. Pow.* (8th ed.) 144.

JONES *v.* WINWOOD.

EXCHEQUER. 1838.

[*Reported* 3 *M.* & *W.* 653.]

ALDERSON, B.[1] In this case we propose to give the reasons which have induced us to send our certificate to the Lord Chancellor in favor of the plaintiffs.

By the original conveyance, dated the 27th and 28th of December, 1819, certain lands were settled to such uses as William T. Davies, and Frances his wife, should at any time or times, and from time to time, during their joint lives, by deed or other instrument in writing duly executed, direct and appoint, and in default of and until such appointment, to the use of William T. Davies for life, with remainder to trustees to preserve contingent remainders, then to the use of his wife for life, then in like manner to the use of his sons in succession in tail general, and then to the use of the daughters in tail general, with cross remainders, and with remainder in fee to William T. Davies himself.

In 1824 William T. Davies took the benefit of the Insolvent Act, and conveyed to the provisional assignee, on the 6th of August, 1824, all his interest in the premises, which was subsequently transferred by the provisional assignee to Isaac Jones, the assignee of the estate, in the usual way.

Under these circumstances, William T. Davies and his wife, in execution of their joint power of appointment, conveyed, on the 16th and 17th of September, 1828, by lease and release, the premises to Patrick Brown

[1] The opinion only is here given.

and Jenkyn Beynon in fee, upon trust for the creditors of W. T. Davies. And the point to be considered is, whether by this appointment any estate passed, and what estate, to the trustees.

The first question is, whether the power was revoked by the conveyance to the provisional assignee; and we are of opinion that it was not. Indeed, on this part of the case there seems to be little difficulty.

No authority was cited for the proposition contended for by the defendant's counsel, that where by previous conveyance a party has prevented himself from executing a power as fully as he could have originally executed it, the power is at an end; nor can any such proposition be maintained. Even upon the authority of the decision of *Badham* v. *Mee* [7 Bing. 695; 1 Myl. & K. 32], as explained by Sir John Leach, this question may be answered in the negative. For he considered the power as not well executed in that case, because the particular limitations made by the appointment under it could not have been valid, if introduced into the original deed creating the power. But if the previous conveyance had altogether put an end to the power, such reasons would have been wholly unnecessary.

Now it is obvious, as was indeed pointed out by the court in the course of the argument, that limitations might have been made subsequently to the conveyance in 1824, which would apply to the life estate of the wife, and the estates tail of the children, and which might legally have been introduced into the original deed, and consequently, upon the principles stated in *Badham* v. *Mee*, such an execution of the power would have been valid; and if any valid execution of the power could have been made, the first of the Lord Chancellor's questions must be answered in the negative.

But in truth, the whole case turns upon the answer to be given to the second question. For if the execution of this power by the deed of September, 1828, be invalid, then no estate passed by it, and the original limitations contained in the deed of 1819 remain still in force.

We think, after full consideration, that this power was well executed, so as to convey the estate for life of the wife, and the estates tail of the children, to the trustees under the deed of 1828.

We cannot adopt the principle laid down by Sir John Leach, in affirming the certificate sent by the Court of Common Pleas in *Badham* v. *Mee*. It is not clear that such was the ground on which that court made their certificate, the reasons for which were not given by them.

We do not think that it is right to translate into words the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed. The utmost extent to which the principle could be carried (and looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a court of equity

would compel them to perform, it may be questionable whether even this ought to be done), would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty would be produced. Here, if the limitation of the estate made by the appointment under this power had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good in point of form, will have, the court looks at the other circumstances; and finding that the insolvent had previously, by an innocent conveyance (for such the assignment under the Insolvent Act must, we think, be considered to be), conveyed away his life estate and his remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes therefore that the deed does not operate on the estates previously assigned.

The result therefore is, that by executing the power, the insolvent conveys to the trustees all that had not been previously assigned under the Insolvent Act to his assignees. In conformity with this opinion we shall send our certificate to the Lord Chancellor.

A certificate was sent accordingly.[1]

Sir W. W. Follett, for the plaintiffs.

Sir F. Pollock, contra.

NOTE. — On the mode of executing a power of sale on a mortgage deed, see *Hall* v. *Bliss*, 118 Mass. 554 (1875).

SECTION II.

SURVIVAL OF POWERS.

ST. 21 HEN. VIII. C. 4. — Where divers sundry persons before this time, having other persons seised to their use of and in lands and other hereditaments to and for the declaration of their wills, have by their last wills and testaments willed and declared such their said lands, tenements, or other hereditaments to be sold by their executors, as well to and for the payments of their debts, performance of their legacies, necessary and convenient finding of their wives, virtuous bringing up and advancement of their children to marriage, as also for other charitable deeds to be done and executed by their executors for the health of their souls. (2) And notwithstanding such trust and confidence so by them put in their said executors, it hath oftentimes been seen, where such last wills and testaments of such lands, tenements, and other hereditaments have

[1] See *Hole* v. *Escott*, 2 Keen, 444; 4 Myl. & Cr. 187 (1838).

been declared, and in the same divers executors named and made, that after the decease of such testators some of the same executors, willing to accomplish the trust and confidence that they were put in by the said testator, have accepted and taken upon them the charge of the said testament, and have been ready to fulfil and perform all things contained in the same; and the residue of the same executors, uncharitably contrary to the trust that they were put in, have refused to intermeddle in any wise with the execution of the said will and testament, or with the sale of such lands so willed to be sold by the testator. (3) And forasmuch as a bargain and sale of such lands, tenements, or other hereditaments so willed by any person to be sold by his executors after his decease, after the opinion of divers persons, can in no wise be good or effectual in the law, unless the same bargain and sale be made by the whole number of the executors named to and for the same; (4) by reason whereof, as well the debts of such testators have rested unpaid and unsatisfied, to the great danger and peril of the souls of such testators, and to the great hindrance, and many times to the utter undoing of their creditors: (5) as also the legacies and bequests made by the testator to his wife, children, and for other charitable deeds to be done for the wealth of the soul of the same testator that made the same testament, have been also unperformed, as well to the extreme misery of the wife and children of the said testator, as also to the let of performance of other charitable deeds for the wealth of the soul of the said testator, to the displeasure of Almighty God. (6) For remedy whereof, be it enacted, ordained, and established by the authority of this present Parliament, That where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements, or other hereditaments to be sold by his executors, after the death of any such testator, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors, and the residue of the same executors do accept and take upon them the cure and charge of the same testament and last will; that then all bargains and sales of such lands, tenements, or other hereditaments, so willed to be sold by the executors of any such testator, as well heretofore made, as hereafter to be made by him or them only of the said executors that so doth accept, or that heretofore hath accepted and taken upon him or them any such cure or charge of administration of any such will or testament, shall be as good and as effectual in the law, as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, which heretofore hath made or declared, or that hereafter shall make or declare any such will, of any such lands, tenements, or other hereditaments after his decease, to be sold by his executors.

II. Provided alway, That this Act shall not extend to give power or

authority to any executor or executors at any time hereafter to bargain or put to sale any lands, tenements, or hereditaments, by virtue and authority of any will or testament heretofore made, otherwise than they might do by the course of the common law afore the making this Act.

ANONYMOUS.

1560.

[*Reported Dyer*, 177 *a*, *pl.* 32.]

Cestui que use (before the Statute) in fee willed by his testament, that A. B. and C. his feoffees, should suffer his wife to take the profits of his land during her life, and after her decease that the premises should be sold by his said feoffees, and the money therefrom received that the feoffees should pay to certain persons and to certain intents prescribed. The testator died, A. died, and the wife died. Whether B. and C. the survivors may sell. And it seems not, and so it was ruled; but *quære* if they had not been named A. B. and C. but feoffees only. See 15 H. 7, 12. [b. *pl.* 22.]

LEE *v.* VINCENT.

Queen's Bench. 1584.

[*Reported Cro. El.* 26.]

The case was, John Lee devised his land to William his son in tail, and if he depart without issue, that his sons in law shall sell it (having then five sons in law) and dieth; and after one of his sons in law dieth, then William dieth, having issue a daughter, and afterward the daughter dieth without issue, the four sons in law that survive sell it. The question was, If this sale were good? — *George Wyat* argued for the plaintiff, and *Godfrey* for the defendant. The points were two. First, for that the son died, having issue, although the issue died without issue, if the sale be good. Secondly, one of the sons in law was dead, and being an authority, it cannot survive. But it was adjudged a good sale, because he named them not by their proper names. *Godfrey* said, it was adjudged, 4 Eliz. where one devised his land to his wife for life, the remainder to his son in tail, and if his son dieth without issue, that his executors shall sell the land by the advice of A. and B. and A. dieth in the life of the son, the sale after the death of A. is not good; but if A. had assented in his life-time, it had been good.[1]

[1] But see *Sykes* v. *Sheard*, 2 De G. J. & S. 6 (1863).

BONIFAUT *v.* GREENFIELD.

Queen's Bench. 1587.

[*Reported Cro. El.* 80.]

The case was, Tremain seised of the manor of D. devised the same to J. S. and three others, and to their heirs, to the intent and purpose that the devisees should set it for the best profit, and convert the money thereof coming, to the performance of his will; and in the conclusion of the will he maketh them four his executors, and dieth. One of the four refuses to meddle with the will or sale; and the other three sell the land in the life of the fourth; the question was, If the sale was good?

The case was argued by *Popham* and *Egerton;* and it was adjudged that the sale was good by the three, either by the common law, or by the 21 Hen. 8, *c.* 4, for when he deviseth the land to four to sell, &c. and afterwards maketh them his executors, this doth *tant amount* as if at the first he had devised, that such his executors should sell; and in such a case at the common law, the sale by three, the fourth refusing, was good; for they three may perform the will without the fourth; but the Statute maketh it clear.[1]

HOUELL *v.* BARNES.

King's Bench. 1634.

[*Reported Cro. Car.* 382.]

Upon a suit in chancery, a case was agreed by the counsel of both parties and referred to Jones, Berkley, and Myself, Justices, to consider and certify our opinions.

The case was, One Francis Barnes, seised of land in fee, deviseth it to his wife for her life, and afterwards orders the same to be sold by his executors hereunder named, and the moneys thereof coming to be divided amongst his nephews; and of the said will made William Clerk and Robert Chesly his executors. William Clerk dies; the wife is yet alive.

Two questions were made: —

First, whether the said William Clerk and Robert Chesly had *an interest* by this devise, or but *an authority?*

Secondly, whether the surviving executor hath any authority to sell?

We all resolved, that they have not any interest by this devise, but only an authority, and that the surviving executor, notwithstanding the

[1] See *Zebach* v. *Smith*, 3 Binn. 69 (1810), *accord.*

death of his companion, may sell; and so we certified our opinions. But whether he might sell the reversion immediately, or ought to stay until the death of the wife, was a doubt. *Vide* 30 Hen. 8, Br. "Devise," 31; 9 Edw. 3, *pl.* 16; Co. Lit. 112, 113, 136, 181; 8 Ass. 26.[1]

LANE *v.* DEBENHAM.

CHANCERY. 1853.

[*Reported* 11 *Hare*, 188.]

DANIEL FOSTER, by his will, dated in 1843, gave and devised unto J. E. Lane and E. Powell, their executors and administrators, his freehold house and premises, known as the George Inn, and the appurtenances, a piece of freehold meadow land called Holywell, two freehold cottages situated in Spicer-street, and a plot of ground at the corner of Dagnal-lane, all in Saint Albans; and also all or any sum or sums of money which might be due or coming to him on the security of any bill or bills, note or notes of hand or other memorandums, a schedule or list of which was therewith enclosed, all book or other contract debts, "and all other his (my) real and personal estate and effects whatsoever and wheresoever," and declared the trusts as follows: — "that the sum of £2000 shall, as soon as convenient after my decease, be raised out of my said estates by sale or otherwise, at the discretion of my said trustees, and that the said sum of £2000 shall be invested in some good and safe security in the names of my said trustees, and the interest and dividends arising therefrom shall be appropriated to the maintenance, support, and education of my daughter Sarah Ann, until she shall attain the age of twenty-one years, after which the said interest or dividends shall be duly paid to my said daughter half yearly for her separate use," for her life, or until the trusts thereof particularly created were otherwise determined. The testator then directed that the residue

[1] See Co. Lit. 112 *b*, 113 *a*, and Hargrave's note *ad loc.*; Jenk. 44.

"As the law now stands, it seems,

"1. That where a power is given to two or more by their proper names, who are not made executors, it will not survive without express words:

"2. That where it is given to three or more generally, as to 'my trustees,' 'my sons,' &c. and not by their proper names, the authority will survive whilst the plural number remains:

"3. That where the authority is given to 'executors,' and the will does not expressly point to a joint exercise of it, even a single surviving executor may execute it; but,

"4. That where the authority is given to them *nominatim*, although in the character of executors, yet it is at least doubtful whether it will survive.

"5. But where the power to executors to sell arises by implication, the power will equally arise to the survivor.

"I shall close this subject with Sir Edward Coke's advice, to give the authority to the executors or the survivors, or survivor of them, or to such or so many of them as take upon them the probate of the will, or the like."— *Sugd. Pow.* (8th ed.) 128.

See *Brassey* v. *Chalmers*, 16 Beav. 223, 231; 4 De G. M. & G. 528 (1853).

of his personal and real estate and effects should be invested or secured at the discretion of his trustees, and the rents, issues, and profits paid over to his wife for her life, subject to certain legacies to legatees therein named, to be paid at their respective ages of twenty-one. And the testator directed that, at the decease of his wife, all such rents, issues, and profits should thenceforth be paid to his daughter, her executors, administrators, or assigns; and in case his daughter should die leaving lawful issue, then he directed that all the said real and personal estate and effects should become the absolute property of such issue; and in case his daughter should die before his wife, and leave no issue, he directed that all his said real and personal estate should be divided between certain nephews and nieces of himself and his wife therein named. By the usual trustee clauses, the testator declared, that his said trustee and trustees of that his will should be charged and chargeable only with such moneys as they should actually receive by virtue of the trusts thereby reposed in them, &c.; and that it should be lawful for his said trustees respectively, by and out of the moneys which should come to their or his hands, to retain or allow to each other all costs, &c.; but there was no clause declaring that the receipts of the trustees or trustee should be an indemnity to purchasers of the testator's estate for the moneys therein expressed to be received. The testator thereby appointed his wife executrix, and Lane and Powell trustees and executors of his will; and he died in 1845. Lane and Powell and the widow proved the will, and the two former accepted and acted in the trusts of the devise. Powell died in 1851, the £2000 not having been raised.

Lane, for the purpose of raising the £2000, caused certain of the devised premises to be offered for sale by public auction on the 19th May, 1852. The ninth condition of sale was as follows: — The whole of the property is sold by the vendor under the trusts of the will of Mr. Daniel Foster, deceased, the produce of which is to be invested upon the trusts of such will, and the purchaser shall be satisfied with the investment by the vendor, or, in case of his death, by his personal representatives, of the purchase-money for each lot (after deducting the costs incident to the sale of the property) within twenty-one days after the receipt of such purchase-money, in the name of the vendor or his personal representatives, in such of the public funds as he or they may elect; and he or they will, if required by any purchaser, sign a declaration, that such investment is made on the trusts of the will of the said Daniel Foster, every such declaration to be prepared and executed at the expense of every purchaser requiring the same; and the respective purchasers are hereby excluded from making any objection to the title on account of the omission from the said will of a clause authorizing his trustees or the vendor to give discharges for the purchase-money of the property to be sold under the trusts of the will.

The defendant G. Debenham became, at the sale, the purchaser of Lot I. He subsequently objected to the title, on the ground that the

trust in the will for raising the sum of £2000 could not be exercised by the plaintiff as the surviving trustee. This question the parties agreed to submit to the court in the form of a special case.

Mr. Chandless and *Mr. Surrage,* for the plaintiff.

Mr. Walker, for the defendant.

Vice-Chancellor. [Sir William Page Wood.] The devise in this case to Lane and Powell, their executors and administrators, of the specific freehold estate and other property, "and all other his real and personal estate and effects whatsoever and wheresoever," upon the trusts subsequently declared, is a devise which clearly passes the whole fee to the trustees, although the words executors and administrators are inapt words as to the realty. The question as to the mode of raising the £2000 will not arise, unless the legatee for whose benefit it was intended is alive, a fact which is not stated in the special case. Looking at the question, which, it appears by a letter stated in the case, was asked by the purchaser, whether that person were alive, — to the fact that the abstract was then sent, and that the objection taken was that the discretion as to sale cannot be exercised by one trustee alone, and that the sum might be raised otherwise, I think I may assume the fact of the existence of the party interested at the time of the sale. It will be proper that the declaration of the court should be prefaced by reciting that it proceeds upon that assumption.

The main question is, whether or not, there being a direct trust to raise £2000 by sale or otherwise, — and thus a discretion to be exercised, and one of the trustees being dead, — it is thereby rendered impossible for the surviving trustee to execute this trust without the direction of the court. The money, it is clear, must be raised; can the surviving trustee raise it by means of a sale, or is it necessary to come to the court in order that the court may exercise its discretion whether it is to be by sale, by mortgage, or by some other appropriation?

Mr. Walker has argued, that, whether the case be one of a power or a trust, if it be confided to two persons, or if it be a mere trust for sale, if it be said that the sale is to be made by two persons, a survivor of the two can never execute it. The argument proceeds, as it appears to me, upon an entire disregard of the distinction between powers and trusts. No doubt, where it is a naked power given to two persons, that will not survive to one of them, unless there be express words, or a necessary implication upon the whole will, showing it to be the intention that it should do so. But the ground of that rule is, that, where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction, the property will go as the testator has first directed, unless the persons to whom he has given the power of controlling the disposition exercise that power. He, therefore, to whom the testator has given the property, subject to having it taken from him by the exercise of the power, has a right to say that it must be exercised *modo et forma.* It is therefore a rule of law, that, in all cases of powers, the previous

estate is not to be defeated unless the power be exercised in the manner specifically directed. When, on the other hand, a testator gives his property, not to one party subject to a power in others, but to trustees, upon special trusts, with a direction to carry his purposes into effect, it is the duty of the trustees to execute the trust; — thus, if the direction be to raise a certain sum of money, the estate is thereby at once charged, and it becomes the duty of the trustees to raise the charge so created. If an estate be devised to A. and B. upon trust to sell, and thereby raise such a sum, it is I think a novel argument, that, after A.'s death, B. cannot sell the estate and execute the trust.

In *Nicloson* v. *Wordsworth*, 2 Swanst. 365, and *Crewe* v. *Dicken*, 4 Ves. 97, and that class of cases, the question was a different one, — whether, under a devise to several persons, upon trust to sell, — where the sale takes place in the lifetime of one who has released or disclaimed the trust, the other trustees, in whom the estate is vested by such release, can execute the trust. In *Crewe* v. *Dicken*, there was a gift to A. and B., in trust that they and the survivor of them should sell. One disclaimed, so that in fact the sale was not made by the survivor, and the question was whether the other trustee could sell. Mr. Walker said, that that class of cases turned on the construction given to the word survivor; but it was not only that — it was a question whether, in an event not contemplated by the testator, a person who was acting in the trusts, and in whom the devised estate was vested, could make a good title. In *Nicloson* v. *Wordsworth*, Lord Eldon said, he had not much doubt, and that in his own case, if he were himself the purchaser, he would not reject the title on that ground alone. Where there is a power given to A. and B., and no estate given to them, if A. dies or renounces, B. alone cannot make a title. Lord St. Leonards thus states the rule: — "It is regularly true at common law, that a naked authority given to several cannot survive" (1 Sugd. Pow. 143); and he adds, "the same doctrine applies to powers operating under the Statute of Uses;" and he cites the case from Dyer, "where *cestui que* use in fee, before the Statute of Uses, willed that his feoffees A., B., and C. should suffer his wife to take the profits for her life, and that after her decease the premises should be sold by his said feoffees, — one of the feoffees died, and then the wife died;" and it was ruled that the survivors could not sell. But if an estate be given to two persons, upon trust to sell, there is no doubt the survivor may sell. The case is then within the rule put by Lord Coke, and which I am not aware has ever been disputed, that "as the estate, so the trust shall survive."

The case of *Cooke* v. *Crawford*, 13 Sim. 91, and others, which were relied upon, turned upon the question, whether the trustee could delegate his authority. The parties to whom the estate had been devised for sale had attempted to transfer or devise it to others; and it was held, that the parties thus irregularly constituted trustees of the estate could not exercise the powers, or sell or give discharges to the purchasers.

The case before the Master of the Rolls, *M'Donald* v. *Walker*, 14 Beav. 556, was of the same description. The estate and powers were given to two trustees and the survivor of them; and the question was, whether the survivor could hand over to a devisee of the estate the performance of the powers also; and the Master of the Rolls held that to be so doubtful, that he could not force it upon an unwilling purchaser. Here the estate has not been transferred or devised to other persons, but remains in the survivor of the trustees, in whom the testator placed it.

The real difficulty, if it be one, is in the second point; upon which the argument for the defendant proceeded, — the trust to raise "by sale or otherwise." I do not think the words, "at their discretion," are important. It is said, that the sum might be raised by mortgage or appropriation; and that this is a species of authority which the court will not permit one person to exercise, where it was given originally to two. If, it was asked, the authority follows the estate, — when, on the decease of the trustee, the real and personal estate is separated, — with which estate does it go? Is the heir or the executor to have it? I do not say that a difficulty might not arise upon this point, but it has not arisen. There might be some question whether the authority had come to an end if the real and personal estate had fallen into different hands; but one trustee still alive; and I apprehend, that where you have an absolute trust to raise out of a common fund a sum of money, either by sale or otherwise, in clear terms, as in this case, there is no such difficulty as has been suggested. The sum being necessary to be raised, it is clear, that, if the case were brought here, the court would direct the surviving trustee to raise the money, he having the whole legal estate, and being subject to the obligation to execute the trust. He has the same power as was given to the two trustees, — a power arising from the combined circumstances of the absolute duty which is imposed upon him, accompanied by an estate which enables him to perform it.

The trustee has, in this case, executed the duty which the trust has cast upon him; and I am asked by the defendant to say, that, in doing so, he has committed a breach of trust, because he has proceeded to raise the money after the death of his co-trustee. If I were to lay down such a rule, where is it to stop? It would follow, that, whenever an estate is vested in two or more trustees to raise a sum by sale or mortgage, or even to sell by auction or private contract, the parties must, after the death of one of the trustees, come to this court for directions before they can execute the trust. The court has not better means of exercising the option than the party against whom the objection is taken, nor are its means so good. I think, as I have observed, that the fallacy of the argument on behalf of the defendant is in mixing together the rules applicable to bare powers or authorities, and those applying to interests.[1]

[1] In the United States a power given to executors survives if the exercise is in aid of the administration and settlement of the estate; *e. g.*, a power to sell land to pay

SECTION III.

NON-EXCLUSIVE POWERS AND ILLUSORY APPOINTMENTS.

A. *Non-exclusive Powers.*

WILSON *v.* PIGGOTT.

CHANCERY. 1794.

[*Reported* 2 *Ves. Jr.* 351.]

THOMAS HILL, on the marriage of his daughter Sarah with Charles Piggott, gave his bond to pay within six months after his decease £4,000 to trustees upon trust, to lay out that sum on real or parliamentary security; and subject to the payment of £150 per annum to Elizabeth, wife of the obligor, to permit Charles Piggott to receive the proceeds for life; after his death to permit his wife to receive the proceeds for life, and after the decease of the survivor as to the capital and the proceeds from time to time to pay the same among all and every the child and children of Charles Piggott and Sarah Hill, other than an eldest or only son, at such times and in such proportions as he or she, or the survivor, should appoint by deed or will, and for want of such appointment among such child and children, other than an eldest or only son, equally to be divided among them, if more than one; if but one such child, then to such child; payable to the daughters at 21 or marriage, and to the sons at 21, if Elizabeth Hill, Charles Piggott, and Sarah Hill should be then dead; if not, then immediately after the decease of the survivor; and if any such daughter or daughters should die under age, and unmarried, and any such son or sons under age, that the shares of him, her, or them so dying, in the £4,000, or so much thereof as should not be appointed, should go to the survivors or survivor of them at such times as his or her original share should become payable; the proceeds in the mean time to be applied for maintenance and education of all such child or children; and in case of an only or only surviving

debts and legacies. How far it will survive when its exercise is not for this end does not seem clear. See *Zebach* v. *Smith*, 3 Binn. 69 (1810); *Osgood* v. *Franklin*, 2 Johns. Ch. 1 (1816); s. c. 14 Johns. 527 (1817); *Shelton* v. *Homer*, 5 Met. 462 (1843); *Warden* v. *Richards*, 11 Gray, 277 (1858); *Chandler* v. *Rider*, 102 Mass. 268 (1869). Cf. *Forbes* v. *Peacock*, 11 M. & W. 630 (1843); *Gould* v. *Mather*, 104 Mass. 283 (1870); *Ferre* v. *Amer. Board*, 53 Vt. 162 (1880); *Peter* v. *Beverly*, 10 Pet. 532, 564 (1836).

On the question how far an administrator *cum testamento annexo* can execute powers given to an executor, see *In re Clay & Tetley*, 16 Ch. Div. 3 (1880); *Conklin* v. *Egerton*, 21 Wend. 430 (1839); *Mott* v. *Ackerman*, 92 N. Y. 539 (1883); *Tainter* v. *Clark*, 13 Met. 220 (1847); *Putnam* v. *Story*, 132 Mass. 205, 212 (1882); 2 Woerner, Amer. Law of Adm. §§ 340, 341.

son, to pay the said £4,000 to such only son at 21, and to apply the proceeds in the mean time for his benefit; and in case of no issue, or the death of all such before the £4,000 should be payable, in trust for the survivor of Charles Piggott and Sarah Hill, his or her executors and administrators.

There were four younger children, — Sarah, Elizabeth, Thomas, and Charles. By the marriage settlement of Sarah, dated the 11th of February, 1774, it was recited, that whereas she was entitled to the sum of £1,000, part of the sum of £4,000 payable at the death of Charles Piggott, and also to the sum of £500, both which would belong to her intended husband; and whereas Charles Piggott had agreed to secure an additional portion in consideration thereof, &c., the marriage settlement proceeded, but no appointment was ever executed in favor of Sarah.

Upon the marriage of Elizabeth, 20th July, 1775, her father, by virtue of the power under his marriage settlement, appointed that £1,000, part of the said £4,000, should be raised and paid for the benefit of Elizabeth within six months after his decease, with interest from his decease, as her share of the portion provided for the younger children under that settlement.

Upon the marriage of Thomas, his father appointed that the trustees and the survivor, his executors, &c., should immediately after his decease pay to Thomas Piggott one-fourth part of the said £4,000, which fourth part was agreed to be settled upon the marriage of Thomas.

Charles Piggott the younger, having attained 21, died in the life of his father, who died without making any farther appointment, having survived his wife and her mother.

The bill was brought by the surviving executor of Thomas Hill to have the rights of the parties ascertained, and upon payment, to have the bond delivered up.

The questions were: first, whether the recital in the marriage settlement of Sarah should operate as an appointment; secondly, as to the validity of these partial appointments, and if they were good; thirdly, how the residue should be disposed of, and if among all, whether under the terms of the appointment to Elizabeth, she would be excluded.

Mr. Grant, *Mr. Stratford*, *and Mr. Abbott*, for Thomas Piggott and his children.

Mr. Cox, for Elizabeth.

Mr. Lloyd, for Sarah.

Mr. Graham and *Mr. Scafe* for the administratrix of Charles.

Master of the Rolls. [Sir Richard Pepper Arden.] I admit, that the true construction of this power is, that it is for the benefit of all the children; and an exclusive appointment would not be conformable to it. Supposing it so, the first question is, whether though that would be the conclusion, the father might not by separate instruments provide for each of the objects; and whether any appointment not comprising all is for that reason void. I am glad that I have been furnished with the determination in *Bristow* v. *Warde*, 2 Ves. Jr. 336, which is an

express authority, that under such a power, whether in the ultimate distribution each child must be included for some share or not, the party may exercise his power by separate deeds, which do not give to each child a share. If I understand the argument, it is that this power, if executed at all, must be executed *in toto*. I can understand it in no other way. *Maddison* v. *Andrew*, 1 Ves. 57, has completely decided, that partial appointments may be made; and upon the cases determined it is universally admitted, that if a substantial share is given to each, it may be by different instruments at different times.

The next question is, Whether the recital in the settlement of Sarah can be considered as a declaration, that she should have £1000, part of this sum. It is contended for Thomas and Elizabeth, that this is no positive appointment; that her father never declared, she should have that sum; and never expressed such a purpose in the form, which might be expected from a person executing a power; but it is clear, where a party has such a power, and lays himself under an obligation, or demonstrates an intention, to give a share to any child, the court will enforce it without attention to the mode, in which it is given. In this settlement he declares her entitled to this sum, to which she could only be entitled by his appointment; and the husband makes a settlement in consideration of it. He could have compelled the father to execute a regular appointment. It is a covenant by the father, and *Coventry* v. *Coventry*, 2 P. Will. 222, and the cases of supplying a surrender in favor of any one child prove, that a child shall avail itself of the intention, whatever is the mode in which it is signified. Therefore that clause in the settlement of Sarah is an appointment to her.

In the cases though it is admitted, that a parent must provide for each child out of a fund circumstanced, as this is, none deny the power of doing it at different times, provided he has not violated the trust reposed in him by excluding any one. Till the whole was appointed, Charles was not excluded. If the appointments to the other children were once good, the question is, Whether any subsequent act could devest the shares appointed to those children, who by marriage became purchasers for valuable consideration. I am inclined to think it cannot. A curious question would have arisen if he had made an appointment of the remaining £1,000, totally excluding Charles. He, if living, would have said, he was totally excluded; whether the first, second, or third appointments were good or not; and that he had a right to a share not illusory. I think it could hardly have been contended beyond the £1,000; and that the whole was void; for that would be to say, they were good at first, but became bad afterwards. I should have been sorry to have said so. But he died without any appointment of the remaining £1,000. When this was first heard, I thought, I could have satisfied myself, that the execution of these three instruments leaving that sum unappointed might have been considered as an appointment in equal shares to all; and construed a declaration that each should have £1,000: but I do think, it amounts to an absolute declara-

tion of his intention, that each should under all circumstances and in all events take £1,000. His son's death before him is not immaterial: that might have made him alter what perhaps was his intention: perhaps he could not appoint to the executors of his son. The question is, Whether the consequence has, with respect to that son, made the appointment illusory. This is not merely a power of appointing this sum among his children at such times, and in such proportions, as he shall think fit, but it is expressly declared, that in default of appointment it shall go equally among them. I am to suppose, he knew what the effect of the power was; and what I am about to decree; that so much as should be unappointed would go equally: if so, his dying without any farther appointment is an appointment of £250 to Charles. Then the question is, whether that is illusory, and a mere evasion. If he had appointed that sum to him, and given £250 each to the other three, it would have been good. He has done the same thing upon the doctrine of the cases, where there is a covenant to do an act, which is not done; but the covenanter having suffered property to go so as to produce the same effect, that is held a satisfaction of the covenant; as in *Lechemere* v. *Earl of Carlisle*, 3 P. Will. 211; where lands suffered to descend were held a satisfaction of a covenant to purchase. Therefore there is an appointment of £250 to Charles. As to his not executing his power at once, nothing can be more strong to show, that not merely the legal effect of the power, but the intention of the settlers was, that there might be partial appointments, than the words in the clause of survivorship "or so much thereof, as shall be appointed."

These words are corroborative of that, which according to *Bristow* v. *Warde* is the true construction, that what is not appointed shall go, as the whole would have gone, if no appointment had been made.

Then is there anything to exclude the others? As to Elizabeth, he has not in express words said, the part appointed to her is to be taken in lieu of her share, but "as her share." That goes only to this: that at that time he had not determined that her share should go beyond £1,000, but it is not carried to this extent, that under all circumstances and in all events he meant to devest himself of the power of giving her any more. Then all I can collect is, that he thought £1,000 sufficient for each of those three; and meant to reserve £1,000. This power is exactly the same as that in *Bristow* v. *Warde*. Neither contains a direction as to so much as shall not be appointed. From that case I conclude what I always thought, — that if there is a partial execution as to any, what remains is to be divided as the whole would have been if no appointment had been made. Fortified by that case, I have very little difficulty in deciding this. *Maddison* v. *Andrew* decided all the principles upon which it must be determined.

YOUNG *v.* WATERPARK.

CHANCERY. 1842.

[*Reported* 13 *Sim.* 199.]

IN August, 1757, a settlement was made on the marriage of Henry Cavendish, Esq., afterwards Sir Henry Cavendish, Bart., with Sarah Bradshaw, afterwards Baroness Waterpark, by which £10,000 was to be raised, under the trusts of a term of five hundred years, out of estates, some of which were situate in England and the rest in Ireland, for the portions of the younger children of the marriage. The portions were to be paid, on the day after the death of Sir Henry Cavendish, to such of the younger sons as should attain twenty-one, and to such of the daughters as should attain that age or marry; and the trustees of the term were to raise, out of the rents of the estates, such yearly sum as should be equal to interest *at five per cent* on the portions of the younger children, for their maintenance *until their portions should become payable.*[1]

There were seven younger children who attained twenty-one; but, notwithstanding Sir Henry Cavendish died in August, 1804, the whole of the £10,000 had not been raised; and one object of the suit was to have the remainder raised.

The settlement directed that, if there should be two or more younger children of the marriage, the £10,000 *should be paid to and distributed amongst them* in such shares as Sir H. Cavendish and Sarah his wife, or the survivor of them, should by deed appoint, and, for want of appointment, equally. At different times Sir H. Cavendish and his lady appointed *the whole* of the £10,000 amongst *four* of the younger children, in sums of £2,000 and £3,000. The last appointment was made, of £3,000, in February, 1803, in favor of George Cavendish, one of the children; but that sum had not been yet raised.

The bill, which was filed in June, 1838, by the personal representative of Augustus Cavendish Bradshaw and Deborah Musgrave, two of the children in whose favor no appointment had been made, against Henry Manners Lord Waterpark, who was the grandson of Sir Henry Cavendish and Baroness Waterpark, and was in possession of the estates as heir in tail male to Richard Baron Waterpark, his late father (who was the first tenant in tail male under the settlement), and against the children in whose favor the appointments had been made, and also against Richard Arkwright (to whom Richard Lord Waterpark had mortgaged the estates, but with notice of the settlement), and James Wigram (to whom the term of 500 years had been assigned as a trustee for Arkwright, and who also had notice of the settlement), praying that all the appointments, or, at any rate, the last of them, might be

[1] Part of the case, relating to another point, is omitted.

declared to be null and void, on the ground that the power did not authorize the £10,000 to be appointed to any one or more of the younger children to the exclusion of the others of them; and that the £10,000 might be equally divided amongst all the younger children; or, at any rate, that the £3,000 which had not been raised, might be divided amongst such of them as the court should think fit; and that the plaintiff might be declared to be entitled to the shares of the two children whom he represented.

Mr. G. Richards and *Mr. Shadwell*, for the plaintiff.

Mr. Stuart and *Mr. Law*, for Lord Waterpark; *Mr. Koe*, for George Cavendish; *Mr. Stinton* and *Mr. Parry*, for the other defendants.

The Vice-Chancellor [Sir Lancelot Shadwell], said that the power of appointment was not an exclusive one; and, therefore, each of the younger children was entitled to participate in the £10,000. He held, however, that the three first appointments were good, and that the last only was void. For, thereby, the whole of the fund remaining undisposed of, was appointed to George Cavendish to the exclusion of three of the younger children.

Another question, which was argued by *Mr. Stuart* and *Mr. Law*, on behalf of Lord Waterpark, was whether, as all the younger children had attained twenty-one before their father's death, which took place on the 3d of August, 1804, the plaintiff's claim was not barred by the Statute of Limitations, 3 & 4 Will. 4, *c.* 27, § 40, which enacts that no suit shall be brought to recover any sum of money charged upon or payable out of any land, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same.

The Vice-Chancellor said that the relation of trustee and *cestui que trust* existed between the parties, and, therefore, the Statute did not apply.

Declare that the plaintiff, as the personal representative of Augustus Cavendish Bradshaw and Deborah Musgrave, both deceased, in the pleadings named, is entitled to two seventh parts of the sum of £3,000 of the late Irish currency, part of the principal sum of £10,000 like currency directed to be raised by the indentures of lease and release dated respectively the 10th and 11th days of August, 1757, together with interest thereon at the rate of £4 per cent per annum from the 4th day of August, 1804: and order that the same be raised, by the defendant James Wigram, by sale or mortgage of the estates of the defendant Henry Manners Baron Waterpark comprised in the term of 500 years in the said indentures mentioned, or of a competent part thereof: and that the said two seventh parts and interest, when so raised, be paid to the plaintiff as such personal representative as aforesaid: and that the plaintiff do pay unto the defendant, Sarah Countess of Mountnorris (one of the younger children), her costs of this suit, to be taxed by

the taxing-master of this court in rotation: and refer it to the taxing-master to tax the plaintiffs and the other defendants, except the defendant Baron Waterpark, their costs of this suit: and order that the same, when taxed, together with what the said plaintiffs shall have paid as the costs of the said defendant, Sarah Countess of Mountnorris, be paid by the said defendant Baron Waterpark, or else be raised and paid out of the said estates: and any of the parties are to be at liberty to apply, &c.[1]

RICKETTS *v.* LOFTUS.

EXCHEQUER IN EQUITY. 1841.

[*Reported* 4 *Y. & C.* 519.]

ALDERSON, B.[2] When this cause was heard before me at the sitting of the Court of Exchequer in Equity, in July last, I delivered my opinion on two of the points then made in argument: first that the attestation of the deed, executed in 1804, by General Loftus, was sufficient in point of form; and secondly, that the deed itself was a valid execution of the power secondly mentioned in his settlement. It is not necessary, therefore, again to state the reasons on which that opinion was founded.

Some other points, however, remained for further consideration, and as one of them, at least, involved a question of some importance, I was anxious to avail myself of the experience and knowledge of my learned Brother ROLFE, that I might be assisted in arriving at a correct conclusion thereon. The parties mutually agreed that my decision might be given, notwithstanding the then expected abolition of the court's authority; and, therefore, now, although my powers as a judge in equity have terminated by the passing of the late Act of Parliament, and these cases have been transferred to the Court of Chancery, where they may receive the determination of more competent skill and greater learning, I shall proceed to deliver my judgment on the two remaining points, having the less scruple in doing so, because, on this occasion at least, I shall have the concurrent authority of my learned brother for the conclusions at which I have arrived, although for the reasons of this judgment I am myself properly responsible.

The questions, then, are two: first, whether the will of General Loftus contains such an appointment of his estates as is a valid execution of the first power given by his settlement. By that instrument, after settling his estates, on the occasion of his marriage with Lady Elizabeth Townshend, upon himself for life, and, after his demise, providing for Lady Elizabeth's jointure, and certain other matters which are of no importance on the present question, he conveys the property

[1] See *Bulteel* v. *Plummer*, L. R. 6 Ch. 160 (1870).

[2] Part only of the case is here given.

now in dispute to certain trustees therein named, to the use of Henry Loftus, William Francis Bentinck Loftus, Mary Anne Loftus, Harriet Loftus, and Frances Mary Loftus, the sons and daughters of the said William Loftus, by Margaret his late wife, deceased (who were in fact all the children of that marriage), for such estate and estates, and in such parts, shares, and proportions, manner and form, as he should from time to time by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, published, and declared, in the presence of and attested by three or more credible witnesses, direct, limit, give, devise, or appoint of or concerning the same manors, &c., or any part or parts thereof. And the settlement then provided, that for want or in default of such direction, limitation, gift, devise, or appointment, and subject to any such direction, &c., as should at any time be so made or given, when the same should not be a complete direction or directions, &c. of the whole of the said premises, or of the whole of the premises comprised in such directions, &c., or of the whole and absolute estate or interest therein respectively; and as and when any estate or interest so to be directed, &c. therein, or any part thereof, should respectively end and determine, to the use of William Francis Bentinck Loftus, and his three sisters (the four last-named of the five children, excluding the eldest son), equally share and share alike, as tenants in common, &c., with a limitation over in case of their death without issue to the children of the second marriage successively.

It is not necessary more particularly to state the limitations of this settlement, in order to the proper determinations of the points raised in argument.

General Loftus, having thus settled his estates, married. Subsequently, and during his life, three of the five children of the first marriage died, that is to say, Frances Mary, in 1792, Mary Anne, in 1811, and Henry Loftus, in 1823, all without issue. The surviving daughter, Harriet, married Mr. Ricketts, the present plaintiff, and the surviving son is the principal defendant in this suit.

In 1831, General Loftus himself died, having by his will duly executed and attested, and bearing date 24th June, 1830, after reciting this power vested in him, and the principal provisions of the deed executed by him in 1804, to which it is now necessary more particularly to refer, appointed (subject to a rent-charge of £100 a year, given to Mrs. Ricketts for her life) the whole of the manors, &c. to his only surviving son, William Francis Bentinck Loftus, the present defendant in fee.

The question is, whether such an appointment is valid. It is contended on the part of the plaintiff, that it is not, being an appointment of the whole of General Loftus's settled property; and it was argued that, after the deaths of three out of the five children mentioned in the

settlement, no such appointment could be valid. But after consideration we are clearly of a different opinion. This case cannot properly be distinguished from that of *Boyle* v. *The Bishop of Peterborough*, 1 Ves. Jr. 299; 4 Bro. C. C. 243, where it was expressly laid down that the death of one of a class over whom the power extends, even where there is no power of exclusion, does not prevent an appointment amongst the survivors of the whole property to the full extent of the power. That case has been recognized as good law by a variety of decisions of the most eminent judges: by Lord Eldon in *Butcher* v. *Butcher*, 1 Ves. & B. 89; by Lord Redesdale in *Vane* v. *Lord Dunganon*, 2 Sch. & Lef. 118; by Sir John Leach in *M'Ghie* v. *M'Ghie*, 2 Madd. 368; and by the present Vice-Chancellor of England in *Houston* v. *Houston*, 4 Sim. 111. It must therefore be considered as of undoubted authority and great weight.

The learned counsel for the plaintiff attempted to distinguish it from the present case, but we think unsuccessfully. Here, as there, estates are given to the children of the first marriage as a class, in favor of whom the power was to be capable of execution by General Loftus. The mere circumstance of their being named in this settlement, when the children named constitute the whole family, is not a sound ground for any distinction. The whole object of this provision was clearly to provide for all the children of the first marriage as a body in preference to the other class consisting of those children who might be born of the marriage then about to be contracted: and we agree entirely with the observation of Sir John Leach in *M'Ghie* v. *M'Ghie*, 2 Madd. 378, that it is of great importance to the stability of property not to allow minute distinctions to prevail upon some supposed grounds of inconvenience resulting from an adherence to the authority of a case like that of *Boyle* v. *Bishop of Peterborough*, where the case before the court cannot, as we think this cannot, be substantially distinguished in principle from so leading an authority. For, on this authority, learned conveyancers have probably acted for many years in preparing deeds of appointment, and all these would be put in hazard if the court were so to treat the case. We, therefore, adhere to the authority of that case, and consider it conclusive as to the first question.

The only remaining question is, whether the assignment to Mrs. Ricketts of the annuity or rent-charge of £100 a year for her life invalidates the appointment, and we think it does not. It is admitted that no appointment would be valid which did not assign to her a portion, and a substantial not an illusory portion, of the estates in question. It was suggested that a rent-charge was no part of the estate, and it was compared to the case of General Loftus giving to her a right of way across a part of the property; which would probably be bad, because it would be an illusory appointment. But this rent-charge is very different. This is a beneficial pecuniary interest of considerable amount, and is to come out of the estate. It is not necessary to give a part of the land itself. The power allows General Loftus to

divide the estates in such shares and proportions and in such manner and form as he may think fit; words as large as possible, applicable, probably, alone to beneficial interests of a pecuniary nature, but, with that restriction, including any manner or form of distribution of the property in question which he might think it expedient to adopt. We are therefore of opinion, that General Loftus was at liberty, if he so thought fit, to appoint to Mrs. Ricketts a rent-charge out of the estate in question as her share of that property. And there is no pretence for considering this at all as an illusory appointment.

The result of this will be, that the plaintiff has entirely failed, and that his bill must be dismissed with costs.

Decree accordingly.[1]

Mr. Girdlestone, for the plaintiffs.
Mr. Simpkinson, for the defendants.

GAINSFORD *v.* DUNN.

CHANCERY. 1874.

[*Reported L. R.* 17 *Eq.* 405.]

THIS was a special case.

Under a settlement dated the 31st of August, 1841, the trustees of certain funds were directed, in the events which happened, to hold them on trust for T. Dunn, Mary Dunn, Elizabeth Gainsford, S. R. Dunn and J. I. Stainton (the brother and sisters of Anne Dunn), or their respective issue, in such parts, shares, or proportions as Anne Dunn should by will appoint.

Anne Dunn made her will, dated the 20th of November, 1869, which (omitting formal parts) was as follows: — "I appoint my sisters, Mary Dunn and Sarah Rebecca Dunn, executors. I give and bequeath to my brother, Thomas Dunn, and to my sister Elizabeth, the wife of Robert John Gainsford, Esquire, and Jane Isabel Stainton, the wife of Henry Tibbats Stainton, Esquire, the sum of £5 each. All the rest and residue of my property, of whatever kind and wheresoever situate, and over which I have any power of appointment or disposition, I give, devise, and bequeath unto and to the use of my sisters, Mary Dunn and Sarah Rebecca Dunn, their heirs, executors, administrators, and assigns respectively, for their own absolute use and benefit as tenants in common."

It was stated that Anne Dunn left some property of her own; the exact amount was not given. She was not at her death entitled to exercise any power of appointment other than that stated above.

The first question in the case was, whether the will of Anne Dunn

[1] See *Paske* v. *Haselfoot,* 33 Beav. 125 (1863).

was a valid exercise of the power of appointment. It is unnecessary to state the other questions.

Mr. Southgate, Q. C., and *Mr. Owen*, for the plaintiffs.

Mr. Kenyon S. Parker, for defendants in the same interest.

Mr. Roxburgh, Q. C., and *Mr. Ince*, for other defendants.

Mr. Morshead, for the trustees.

Sir G. Jessel, M. R. There never was a better illustration of the extreme technicality of our law than the case I have before me. One must really state what the law is in order to understand the point raised. Under the old law, when a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held, not irrationally, that the meaning of the person creating the power was, that the appointor should appoint a substantial share to each object of the power. The power was called a non-exclusive power, and it was considered that the author of the settlement intended everybody to take a substantial share. That was not according to the literal wording of the power, but it made sense of it; because if the appointment of a farthing would do, then, on the principle "*de minimis non curat lex*," it would make every non-exclusive power an exclusive power. However that doctrine was found inconvenient. No one knew exactly how much a substantial portion of the property was, and it was impossible to say, without resorting to litigation, what the least sum was which the appointor was authorized to appoint. That inconvenience led to an alteration of the law, and the Legislature, under the guidance of a very great lawyer, made this very remarkable alteration: it directed that in future no appointment might be objected to on the ground of its being illusory, that is, on the ground of the smallness of the sum or share appointed, but it did not alter the construction of the power. The consequence of this remarkable alteration of the law has been this, that where the power is non-exclusive, if the appointor forgets to appoint a shilling, or even a farthing, to every object of the power, the appointment is bad, because some one is left out. One would have imagined that the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get. However that is not the state of the law, and in this present instance an appointment by a lady, who had a power of appointment between her brother and her sisters, is objected to, because it is said she has forgotten to appoint a shilling to the brother and two of her sisters, she intending that the remaining two sisters should take the whole of the property. I have now to decide whether this appointment is bad on that ground. That question depends on the construction of the lady's will, and that, again, depends on the rules of construction which have been adopted, certainly not with a view to the exercise of powers of appointment, but with respect to a very different subject-matter.

There can be no doubt that this is a non-exclusive power. The

power is : — [His Honor stated it : —] Therefore Anne Dunn could only appoint among those persons named in the settlement, and she could only appoint in such shares and in such manner. She had no power to exclude any one. She was a spinster. It was stated that she had some personal estate, and that it was small, but my judgment does not turn on the amount of it, which is not stated in the special case. She has made her will as follows : — [His Honor read it].

Now it was conceded in argument that if the lady had given a shilling out of the appointed fund to the brother Thomas and to the sister Elizabeth and the sister Jane, then, under the words I have mentioned, the two other sisters, Mary and Sarah Rebecca, would have taken a fund over which she had a power of appointment, absolutely. But it was said that the appointment would fail altogether, because she had given nothing out of the appointed fund to the brother and to the two sisters. That, as I said before, is a question of construction of the will. It was opened as if it was incapable of argument ; but I think it not only capable of argument, but, upon consideration, I have not even called on the other side. The question is, whether any part of the sums of £5 each given to the brother and the two sisters is or is not payable out of the fund subject to the power of appointment. The gift is, no doubt, of £5 only, and if there had been nothing else afterwards, would have been a common legacy out of her personal estate. Then she gives the rest and residue of her property, of whatsoever kind, and wheresoever situate, and over which she has any power of appointment or disposition, to the use of her sisters, Mary Dunn and Sarah Rebecca Dunn, their heirs, executors, administrators, and assigns, for their own absolute use and benefit. So she has given the residue, first of her property, and next of property over which she has a power of appointment ; she has given them together. Now this kind of gift has been the subject of frequent judicial decision. I may refer to the case of *Bench* v. *Biles*, 4 Madd. 187, to the case of *Greville* v. *Browne*, 7 H. L. C. 689, and the later cases of *Francis* v. *Clemow*, Kay, 435, and *Gyett* v. *Williams*, 2 J. & H. 429, before Vice-Chancellor Wood. Those cases were cases of a gift of residue of real and personal estate ; but the result of the cases is this : that where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to charge the legacies proportionally and ratably upon the mixed fund. The question has generally arisen when the personal estate has failed, when it is said the legacy is payable out of the real estate. But in truth it is payable out of both funds, by force of the word residue, and therefore to some extent depends on the relative value of the funds. That being so, and applying that doctrine, the sums of £5 each are payable partly out of the testatrix's own property, and partly out of the fund appointed. The rule is, that there must be at least a farthing payable out of the fund subject to the power, and, as I said before, however

small the sum appointed may be, the appointment cannot be objected to as being illusory. This is an appointment out of the fund of some portion of the £5 to the brother and each of the two sisters. The consequence is, I hold the power well executed, and each of the ladies will take, subject to the small legacy, the whole of the appointed fund, and thus I can give effect to this lady's will. In fact, it is an instance, of which we have so many, of a technicality defeating a technicality, and the true intention of the testator taking effect.

B. *Illusory Appointments.*

GIBSON *v.* KINVEN.

CHANCERY. 1682.

[*Reported* 1 *Vern.* 66.]

THE case was, that one Harris in his lifetime being possessed of a considerable personal estate, and having issue four children, viz., two sons and two daughters, and Mary, one of his daughters, being now married to the plaintiff Gibson, and Ann his other daughter to the defendant Kinven, he made his last will and testament in writing, and thereby devised several particular legacies to each of his children, and gave his ready money, goods, plate, and household stuff to his wife *upon trust and confidence that she would not dispose thereof but for the benefit of her children.*

The wife after the death of her husband made her will, and therein calling herself his executrix and residuary legatee, she gives several legacies to some of her children, and but *5s.* only to the plaintiff and her children, and devises all the rest of her estate to her son Bartholomew.

The bill was to be relieved herein, the plaintiff insisting that the wife having devised all this estate to one of her children *only*, this was a void bequest, and a breach of her trust, and that therefore the plaintiffs ought to be let into a full third part of the said father's estate intrusted with the mother as aforesaid; one of the said brothers after the making of the said father's will, dying in his lifetime.

The defendants by answer confessed the will of Harris the father, and did admit that one of the brothers was dead in his lifetime; but set forth further that the plaintiff had by some means disobliged her mother in her lifetime and though they had endeavored to reconcile them, and to persuade the mother to leave the plaintiff her daughter a better legacy, yet they could not prevail with her to do it. And further say, that about three months since, to prevent disputes there was a case touching this matter drawn up, and agreed to by the plaintiffs, and referred to Sir Francis Pemberton, now Lord Chief Justice of England, to

determine, who gave it as his opinion, that, notwithstanding the words in the will, viz., *upon trust and confidence that she will not dispose thereof but for the benefit of her children*, yet that the executrix had power to dispose of the residue to which of her children she would, and that she was not bound thereby to divide it equally; and that if she had given the plaintiff her daughter but a ring only, it had been good.

After this cause had been much debated, and several precedents produced, where in such cases very unequal distributions had been approved and ratified by this court, the Lord Chancellor [Lord Nottingham] decreed for the plaintiff; for that the distribution in this case was so very unequal, and that without any good reason shown to warrant it: and therefore he thought fit to rectify it in this case, and could not do it otherwise than by decreeing an equal distribution.[1]

BURRELL *v.* BURRELL.

Chancery. 1668.

[*Reported Ambl.* 660.]

One by will gave all his real and personal estate to his wife, to the end she might give his children such fortunes as she should think proper, or they best deserve; to whom he charged his sons and daughters to be dutiful and obedient, and loving and affectionate to each other.

There were five children of the testator who survived him, a son by a former wife, and four daughters by his last wife.

The son had an estate settled upon him of £400 a year: the daughters had about £500 apiece portions.

The wife executed the power by will, and devised the estate to trustees to sell, and out of the money to pay to her two daughters Frances and Ann £200 apiece, to the son one guinea, and the remainder to her two daughters Catherine and Mary, share and share alike.

Bill by the plaintiff, as representative of the son, to set aside the appointment as illusory. And it was argued: first, that every one of the children was, by the terms of the power, to have something. That a guinea is considered as nothing, and illusory. Second, that the wife could not take the provision for the children into consideration, because the father did not: he knew that the son had £400 a year settled on him, and yet directed the appointment to be made among his children.

On the other side, it was argued, that the wife had a discretionary power with respect to the objects as well as the fund, and was not obliged to make an appointment among all the children, but might confine it to such of them as she pleased. That she had executed the

[1] See *Butcher* v. *Butcher*, 9 Ves. 382, 397 (1804); *Bax* v. *Whithead*, 16 Ves. 15, 24, 25 (1809).

power very properly, considering the provision which the son was entitled to; and though the father might know of that provision, yet he did not mean that it should not have weight with his wife in the execution of the power. And Lord Camden [C.] being of the same opinion, which he delivered at large, the bill was dismissed.[1]

BUTCHER *v.* BUTCHER.

Chancery. 1812.

[*Reported*, 1 *V. & B.* 79.]

May 2, 1812. — The Lord Chancellor.[2] [Lord Eldon.] This last point, when it was first mentioned, struck me forcibly; and I had a faint, by no means an accurate, recollection of some cases upon it. The question with reference to this point is, what is the law at this day, as to the due mode of executing a power of appointment by a parent among all the children, to be executed at any time up to the death of the parent, even by deed, or will; where some of the children are dead before any appointment. I put it so, thinking it much better, after the case of *Boyle* v. *The Bishop of Peterborough*, 1 Ves. Jr. 299, has stood so long, to abide by it: leaving the inconvenience, arising from the doctrine there established, to be met and guarded against by care, than by disturbing that decision to throw this subject again into a state of extreme uncertainty; or to determine it by a rule, not reconcilable to any principle.

This settlement, which was drawn by Mr. Partington himself, a most accurate draftsman, is extremely well expressed with regard to the power. The peculiarity, that it is to extend to children of future marriages, is of little consequence; as the word "children" alone would include children by any marriage. It is true in expression the interests are to vest in the children at the age of twenty-one, or marriage of daughters, and only in default of appointment: but, though the practice of conveyancers to intimate that expressly is useful, yet, where the power may be executed by deed at any time during the life, or by will, which may be the last act of the party, though the instrument does not state, that the interests shall vest at twenty-one, &c. in case of no appointment, or as to what is unappointed, the implication, that they shall so vest, is necessary, as without that implication the power could not continue, as long as by the express terms it is to continue, capable of execution. There is in this case a peculiarity; upon which it is

[1] But see *Vandersee* v. *Aclom*, 4 Ves. 771 (1799); *Spencer* v. *Spencer*, 5 Ves. 362, 363 (1800); *Kemp* v. *Kemp*, Ib. 849, 860, 861 (1801); *Lysaght* v. *Royse*, 2 Sch. & L. 151 (1804).

[2] The opinion only is here given.

impossible to conclude, that no one family, or class of children, should take more than another class by a different husband. The event of children by future marriages is contemplated; and a provision is made; not calculated so to limit her power, that each family shall take equally: but the limitation is, that she shall not give more than one-half to the second, or any subsequent family, or among them all.

It has been long settled, that an appointment cannot be made to a deceased child, *Maddison* v. *Andrew*, 1 Ves. 57; or to the personal representatives of a deceased child; and therefore before the case of *Boyle* v. *The Bishop of Peterborough* it must have frequently occurred, that this might happen; unless by some circuity or device the families of deceased children were included: where all the children were intended to take, eleven out of twelve might die, leaving children, and yet, if the party cannot appoint to a deceased child, or the representatives, or to grandchildren, the consequence must be, guarded as it is too by this doctrine of illusory appointment, that the surviving child would take the whole of that, which was intended for all; unless that can be prevented by other means than an appointment.

The mode of executing the power in the case of a deceased child, according to the old practice of conveyancers, that prevailed before the case of *Boyle* v. *The Bishop of Peterborough*, was by giving part to the surviving children; making no appointment of the residue; which therefore was permitted to go as in default of appointment. That certainly was very ill-conceived, and incorrect. The consequence was, that, as in most cases the share unappointed would go among all, who attained twenty-one, living and dead, as property vested in them at that age, or on marriage of daughters, it would be divisible among a child surviving, and all those, who were dead: but it is very difficult, almost impossible, to speak of that sort of device as an appointment. Lord Thurlow dissented from that, which I understand to have been the previous notion of conveyancers: and established the rule in that case of *Boyle* v. *The Bishop of Peterborough;* as it has been stated by Sir Arthur Piggott; and Lord Loughborough also appears, in *Reade* v. *Reade*, 5 Ves. 744, to have disturbed that doctrine: giving the fourth, which according to the old course would have been divided among the four, to the representatives of the deceased child. I do not perfectly understand the case; which is quite novel in this respect: but, if the doctrine, resulting from it, is not agreeable to what was previously understood to be the law as to the fund unappointed, as to the appointed shares it follows *Boyle* v. *The Bishop of Peterborough;* which it is better to abide by; leaving the inconvenience, that may arise from it, to be met by care, than to exchange it for the old inconvenience, nearly as considerable; and not got rid of by any doctrine, resting upon sound principle. It happens, that there is in this case a share unappointed: the portion given to Mrs. Hall's children. It is unnecessary to determine, whether the doctrine, which prevailed before *Boyle* v. *The Bishop of Peterborough*, would apply; as I certainly shall

not disturb that case; and that is sufficient with reference to this last objection.

This reduces it to the extremely distressing point; which has been decided upon the execution of this power; and as to that with an unaffected respect for the opinion of the Master of the Rolls, and not presuming to think my opinion better, I would rather say, at once, in direct terms, that the court ought never to discuss, whether an appointment, good at law, is bad here, as being illusory. I do not think the court is now at liberty to act upon the principle, on which this decree proceeds, or upon that, which I have just intimated may be the better opinion. If a long series of authority has established, that an illusory appointment is bad, however difficult in each case to determine, whether the appointment is, or is not, illusory, taking that difficulty to be as considerable, as can be represented, the duty is imposed upon the court, and cannot be cast off, to meet, and get through it with as much sound discretion as can be applied.

The real question therefore, and a very difficult question, is, whether this appointment is illusory. In order to determine that question I will read the case again: but the strong inclination of my opinion is, that this appointment is not illusory. I think, the author of this power has given a very large discretion; and am much struck with the circumstance, that the parent is enabled to do this: if, instead of twelve, there had been twenty children by the first marriage, and only one child by a second marriage, that child might have had one equal moiety; and the other moiety might have been justly divided into twenty parts for the first class of children. That is one extremely strong circumstance; there are also other circumstances, to be attended to; and upon the whole the strong inclination of my mind is, that this is not illusory.

Nov. 21, 1812. — The Lord Chancellor. After the decree was pronounced, from which this appeal is presented, two cases were decided at the Rolls: *Mocatta* v. *Lousada*, 12 Ves, 123; and *Dyke* v. *Sylvester*, 12 Ves. 126; and the opinion, intimated in my judgment upon the appeal from the decree in *Bax* v. *Whitbread*, 10 Ves. 31; 16 Ves. 15, that considerable difficulties occurred to my mind as to the principle upon which I understood the Master of the Rolls to have decided the three preceding cases, has produced this appeal.

It is impossible to describe in stronger terms than I used on that occasion the extreme distress, in which the rule of this court, if such as I conceive it to be, places a judge, who is called on to determine, whether an appointment is, or is not, illusory. I could not select more apt expressions than are to be found in Lord Alvanley's judgments; nor more appropriate terms than those contained in the judgment of the present Master of the Rolls, now under review; who has intimated this in substance: that he does not know what is an illusory appointment; when it is said, a *bona fide* substantial share shall be given to each object, and, when it has been held, that £100 is such *bona fide*

substantial share of £1200; when judges, such as Lord Alvanley, have pronounced, that £10 is nothing, declining to say, whether £50 out of £1900 would be a substantial share: the Master of the Rolls states, that he will relieve himself from the difficulty, belonging to such a case, by taking the rule thus: if you can a show a case, where the sum appointed bears the same proportion to the whole sum, which is the subject of the power, as any other sum, which has been actually decided to be illusory, with reference to the whole sum, the subject of the power in the case so decided, he will adopt that rule of proportion; that, as the share, appointed in each case, does or does not bear the like proportion, as in the decided case, it is, or is not, illusory; and, as I understand him, he says, he will proceed upon that rule, until instructed by higher authority.

In the case of *Bax* v. *Whitbread*, where I was compelled to observe upon that doctrine, I intimated as strong a wish, as a judge can entertain, that I could adopt that principle in practice; which would relieve us from distress in a class of cases, the most distressing we have to deal with: but it still appears to me, as it did on that occasion, that where a power of appointment was given in terms, importing the most unfettered authority, for instance, among children, or other objects, in such shares and proportions as the person, executing the power, shall think fit, this court had in a course of authority, governing its decisions for ages, taken upon itself to say, whether at first upon a sound principle, or misled by some misapprehension, that, however large the terms, the execution must be governed by a sound discretion; that it is a power in some degree coupled with a trust; which, if not executed *bona fide,* and according to the *arbitrium boni viri*, the execution would be good for nothing; and this court would resort to that loose doctrine, as it certainly is, though it has been stated by the greatest judges, that equality is equity; and the fund is to be distributed, as if no such power had been given.

Such appearing to me, as it appeared to Lord Alvanley, the course of the court, I here express with the Master of the Rolls my sincere wish, that it should be corrected by higher authority: but, unless taught by higher authority, I cannot disavow the jurisdiction, so long exercised; whatever the difficulty of acting upon it may be. Having given to this subject the most deliberate attention, I find it in such a state of contradiction, both from *dicta* and decisions of great judges, that, if I had to advise, I could not say, how such a power can be safely exercised.

Upon a subject which has been so much the topic of discussion and decision, it would be a waste of time to trace the doctrine from beginning to end through all the cases; as has been my habit: which I hope will produce at least this degree of service; that I shall leave a collection of doctrine and authority, that may prove useful. With regard to this particular doctrine, which originated with Lord Nottingham, I observed in *Bax* v. *Whitbread*, 16 Ves. 15, that I cannot

agree with him in the first case he decided; which went to this extent; that equality is equity; and if that is disturbed by the exercise of the power, some extremely good reason must be shewn. It is impossible to admit, that this is the modern doctrine of the court; which gives full sanction for declaring, that it is not necessary for the person, executing a power of appointment, to give the subject in equal shares; and I may upon the result of the authorities say, it is now reduced to this; that, unless the share appears upon the mention of it not to be a substantial part or share of the subject of the power, the court never does call on the person, executing it, to say, why he has not given in equal shares among the objects.

In the same, or a subsequent, case Lord Nottingham says, these powers are to be good according to circumstances. If he had explained that, it would have relieved the court; and might have met the observation, which is now justified; that upon this subject the books are full of *dicta*, marked by contradiction; and decisions, with regard to each of which no one might agree with the judge, who decided it. The doctrine is as loose as this; that, though a power is given, to be exercised according to discretion, as to the shares, yet in effect, unless the judgment of the person, who was to exercise that power, agreed with the judgment of the judge, who had to decide upon the execution, it is impossible to know, whether the execution would, or would not, be good.

In this way, through all the cases, in some it is said, that a reason for inequality must be alleged in the instrument, executing the power; in others, that you shall be at liberty to prove a reason, though not assigned: in some, that, if the person executing has made another provision for the party, who suffers by the inequality, that is a ground for holding sufficient the small sum, which Lord Alvanley would have characterized as nothing; the phrase, by which he describes an unsubstantial share: but the same cases say, that, if the other provision comes *aliunde*, it will not assist the appointment; others saying, it certainly will; the person, executing the power, having only to look to what is reasonable; attending to all the circumstances, affecting the situation of each part of the family. It has been said by older judges, that the power may be executed by a parent, having regard to the conduct of the child towards that parent. In later cases that has been represented as most dangerous; and too delicate a discretion to be intrusted; and it is, I agree, a very delicate discretion: but then I am at a loss to say, these powers are not frequently created for the very purpose of giving the parent control over the child: a bridle upon the conduct of the child, according to the language of some cases; and if these *dicta* have any foundation in reason, it is extraordinary to say, the power is given as a bridle upon the conduct of the child: and yet the conduct of the child shall not be a circumstance, regulating the conduct of the parent.

I do not pursue the variety of other contradictions, that may be

pointed out: but will notice one, of some importance. It is said universally, and cannot be controverted, that any of these appointments, under which each of the objects has some share, is good at law: but that, where that share is illusory, that is a fraud upon the power; and must be dealt with accordingly in this court. Some judges have said, and the Master of the Rolls in his very able judgment, (which cannot be read without the observation, that it is a most able exposition of his sentiments) grounds one of his difficulties upon this, that a deed cannot be fraudulent, unless it is fraudulent both in law and equity; that the question of fraud is the same in the one court as in the other. To that doctrine I do not agree. Though in modern times, and particularly during the period, in which I have been engaged in this hall, a strong inclination has been evident to say, that whatever is equity ought to be law; an opinion, acted upon especially by Mr. Justice Buller; who persuaded Lord Mansfield to act upon it, until it was reformed by Lord Kenyon, with the assistance of the same very able judge, as he certainly was; yet the clear doctrine of Lord Hardwicke and all his predecessors was, that there were many instances of fraud, that would affect instruments in equity; of which the law could not take notice: and this class of cases is one instance.

Without going through all the cases upon this subject it will be sufficient to name the late cases, in which the whole subject is exhausted; all the contradictions, both of *dicta* and decisions, are noticed; and all the cases referred to; with particular citations, collected from the most authentic accounts of them: *Pocklington* v. *Bayne*, 1 Bro. C. C. 450, before Lord Thurlow; who decided in a very short way, which was not his habit, that an appointment of one acre for life was illusory: *Bristow* v. *Warde*, 2 Ves. 336; *Vanderzee* v. *Aclom*, 4 Ves. 771: *Kemp* v. *Kemp*, 5 Ves. 849; *Mocata* v. *Lousada*, 12 Ves. 123; *Dyke* v. *Sylvester*, 12 Ves. 126; and *Bax* v. *Whitbread*, 10 Ves. 31; 16 Ves. 15.

It is unnecessary to detail very particularly the circumstances of the present case; which is in print. The short result is, that this lady, having married against the wishes of her father, who created a trust as to the whole of his property in Mr. Pickering and Mr. Partington, had a power to give a freehold estate to any of her children after her death; whether that would extend to children by any other husband, is immaterial. She had also a power to give £4,000 to any person she might think fit immediately; a farther power to appoint £6,000 with some household furniture to any person; of course including her husband and children: and in default of appointment that sum would vest in her. The residue she was to have for her life; and at her death she had a power to appoint it among her children: but, in addition to that, as large a power as possible, from time to time, and by deed, to appoint any part from time to time to any child, as she should think fit; and, in default of such appointments from time to time and at her death, the value was to go among the children equally. Then follows

a very important clause; contemplating the event of another marriage; and providing, that nothing in this settlement shall authorize her to give to the children of any other husband more than a moiety of that residue, over which her power extended.

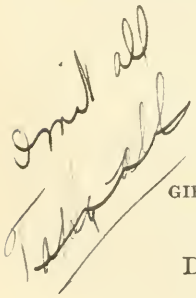
The effect is, that, as the children came into existence, the shares vested, subject to be varied by the births of future children, and the exercise of her power: regulated only by this; that the children or child of a future marriage should not have more, but might have as much as one moiety. She did exercise her power to appoint from time to time during her life: the first appointment taking the share appointed out of the subject of the power; and leaving the remainder to be appointed among the children; including the child, in whose favor the power had been executed, and the children of a future marriage: which child, for whom that appointment was made, might in the event of another marriage take, besides the share appointed, one moiety of the whole. This was followed by subsequent executions of the power from time to time: every appointment taking out of the general subject of the power so much; and leaving the residue vested, and to vest, in the remaining and future children: the number incapable of being ascertained, until she reached an age, at which she could not have more; and if there had been one child by a subsequent marriage, after all these particular appointments, that child might have taken a moiety of what constituted the whole fund before any appointment; though that should leave to perhaps twenty children of the former marriage only their respective shares of what remained unappointed.

It is evident, how immensely large a discretion was given; and to what the fund might by repeated executions of the power be reduced; and this goes far to show, that her discretion must, as far as it can in any case, be unfettered. The consequence is, that this fund, which was the subject of these powers, became reduced to the subject of the last appointment. With regard to that it is clear, that, if the last appointment could not be maintained, that would by no means shake any of the former appointments.

A circumstance exists in this case with regard to one of the children, which I mark very particularly. When this court takes upon itself to judge, whether these powers are, or are not, well executed, if given to parents in settlements with any of the views I have mentioned, to be regulated by the conduct, state, and circumstances of the children, this is a circumstance we know better how to deal with than many, that might occur in the state of families; with reference to which such questions arise. This child was a lunatic; and a very large provision is made for her. Considering this subject unprejudiced by decision, I cannot help saying, that, if, with such a power, I had a son, well provided for, embarked, for instance, in this profession, and rising in his circumstances, and a daughter in this deplorable situation, great inequality would not appear to me to be injustice. It is farther obvious in experience, that a large provision, made for one child, may be the

best thing possible for another: but, I agree, the court has not trusted itself with such considerations.

The question is then reduced to this; whether, as Lord Alvanley said as to £10, refusing to say it as to £50, I can say upon the last appointment, that, as this is a power, coupled with the execution of a trust, recollecting always, that it must be considered with reference to the nature of the trust, to be collected from the whole of the instrument, the shares, given to Mrs. Gooday and the other children, are not substantial; not now attending to the circumstance, that there is an excess in the execution of the power by giving to grandchildren; which must be divided among all; as in default of appointment. I concur with the Master of the Rolls, that the recent cases reduced the question to this: whether attending to all the circumstances, and the nature of the trust, collected from the deed, the court can take upon itself to say, the share is not substantial; that I am not authorized to say so in this case; and therefore avowing the great difficulty, in which the court is placed upon this subject, I cannot say, that this decree ought to be reversed; and consequently it must be affirmed.[1]



SECTION IV.

GIFTS IMPLIED IN DEFAULT OF APPOINTMENT.

DOYLEY *v.* ATTORNEY-GENERAL.

CHANCERY. 1735.

[*Reported* 4 *Vin. Abr.* 485, *pl.* 16.]

ONE Timothy Wilson being seised of lands in fee, and also possessed of a considerable personal estate, by will dated 22d of March, 1714, gave all his real and personal estate to two trustees, their heirs, &c., in trust, to pay the produce thereof to his niece Elizabeth Wilson for her life, and after her death he gave the said real and personal estate to the son and sons, which his niece should leave behind her, severally and successively according to seniority, and the heirs of the body of such son and sons issuing, the elder to be preferred, &c., and for want of such issue, that is, in case all such sons died without issue before any of them attained twenty-one, then he gave the same to the daughter and daughters which his niece should leave behind her at her death, and the heirs of their respective bodies issuing; and for want of such issue, that is (as he expressed himself) in case all such daughters died without

[1] See Sugd. Pow. (8th ed.) 938–942.

The doctrine of illusory appointments has been repudiated in Pennsylvania, *Graeff* v. *De Turk*, 44 Pa. 527 (1863).

issue before any of them attained twenty-one, then the said trustees and the survivor of them, and the heirs and executors, &c., of the survivor, were to dispose of his real and personal estate to such of his relations of his mother's side who were most deserving, and in such manner as they thought fit, and for such charitable uses and purposes as they should also think most proper and convenient. One of the trustees declining to act in the trust, Elizabeth brought her bill in Michaelmas, 1715, to compel him to act in the trust, or to transfer the same as the court should direct; and he refusing to act, the court decreed him to assign the trust as the master should direct, and accordingly he by lease and release assigned and conveyed the premises, with the approbation of the master, to another person in trust for the uses of the said will. Elizabeth died without issue in 1732, and on a bill brought by the testator's relations on the mother's side, to have their share of the said estate, and on a cross bill brought by the Attorney-General to have the same applied to charitable uses as the court should direct, the MASTER OF THE ROLLS [SIR JOSEPH JEKYLL] held clearly that the limitation over of the personal estate was good, and that the power given by the will to the trustees of distributing the testator's estate as they thought fit was at an end, and could not be assigned over, and that therefore the power of distributing the same devolved on the court; and she directed that one-half of the said estate should go to the testator's relations on the mother's side, and the other half to charitable uses, the known rule that equity is equity being (as he said) the best measure to go by. He said, that he had no rule of judging of the merits of the testator's relations, and could not enter into spirits, and therefore could not prefer one to the other; but that all should come in without distinction, excluding only those that were beyond the third degree. He held, that as to the personal estate, there should be no representation of those relations who died in the lifetime of Eliz. For before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not, and decreed so accordingly. His Honor cited a case determined by Lord Cowper, which was where one gave his personal estate to his relations, fearing God and walking humbly before him, and decreed by him that it should go equally among his relations.

HARDING *v.* GLYN.

CHANCERY. 1739.

[*Reported* 1 *Atk.* 469.]

NICHOLAS HARDING in 1701 made his will, and thereby gave "To Elizabeth his wife all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but did desire her at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, unto and among such of his own relations, as she should think most deserving and approve of," and made his wife executrix, and died the 23d of January, 1736, without issue.

Elizabeth his widow made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry Swindell in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband's jewels to his relations.

The plaintiffs insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestate's effects.

MASTER OF THE ROLLS. [HON. JOHN VERNEY.] The first question is, if this is vested absolutely in the wife? And the second, if it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words *willing* or *desiring* have been frequently construed to amount to a trust, *Eades & ux.* v. *England & ux.*, 2 Vern. 466, and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such, that it is impossible for the court to determine what persons are meant, it is very strong for the court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word *relations* is a legal description, and this is a devise to such relations, and operates as a trust in the wife by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the Statute of Distributions, yet that is a good rule for the court to go

by. And therefore I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order, that so much of the said household goods in Hatton Garden, and other personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding his wife, which she did not dispose of according to the power given her thereby, in case the same remains in specie, or the value thereof, be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.[1]

CASTERTON *v.* SUTHERLAND.

CHANCERY. 1804.

[*Reported* 9 *Ves.* 445.]

THOMAS FOWLER, by his will, dated the 30th of January, 1766, devised all his freehold lands, &c., in Chelsea, or elsewhere, to his wife Lucy for her life, and from and after her decease to his children in the following manner: "Unto and amongst all and every our children, in such manner and in such proportions as my said wife shall either in her lifetime or by her last will and testament direct and appoint." He empowered his wife to sell the estates, and to lay out the money, and receive the interest for her life; and after her decease he directed and appointed the same, both principal and interest, to be paid and applied "to and among our children in such proportions as aforesaid." He appointed his wife executrix. The testator left his wife surviving him, and five children: John, Thomas, William, Henry, and Lucy. John, Thomas, and William died infants and unmarried in the life of their mother. Henry attained 21, and married; but died in the life of his mother; leaving issue one daughter, Sarah Casterton. Lucy, the daughter, survived all her brothers; but died also in the life of her mother; having married the defendant Thomas Sutherland the elder; by whom she had issue the other defendant, Thomas Sutherland the younger. The widow died; not having executed any appointment. The bill was filed by James Casterton and Sarah, his wife; claiming in her right under the will.

Mr. Piggott and *Mr. Trower*, for the plaintiffs.

Serjeant Palmer and *Mr. Hart*, for the defendants.

THE MASTER OF THE ROLLS [SIR WILLIAM GRANT] was clearly of opinion, upon *Reade* v. *Reade* [5 Ves. 744], that this was a tenancy in common among the children in fifths, subject to the power of ap-

[1] See, *accord.*, *Brown* v. *Higgs*, 4 Ves. 708 (1799), s. c. 5 Ves. 495, 501–503 (1800); 8 Ves. 561, 571 (1803). Cf. *Finch* v. *Hollingsworth*, 21 Beav. 112 (1855).

pointment; and that though in the devise of the lands in the first part of the will there were no words of inheritance, yet in the subsequent part the testator giving his wife power to sell the estate, and appointing the money, both principal and interest, among the children, as the testator could not be supposed to intend to give them a larger interest in that part than in the former, they took several estates of inheritance.

The decree declared, that the children of the testator, living at his decease, became entitled equally as tenants in common to the freehold estates, of which he died seised, subject to the estate for life and power of appointment of the widow; and, the widow having made no appointment, the plaintiff Sarah Casterton, as only child and heiress at law of her father Henry Fowler, who was heir at law of his brothers William, Thomas, and John, who survived the testator, and died unmarried, and without issue, is in the events, that have happened, entitled to four fifths; and the testator's daughter Lucy, the deceased wife of Thomas Sutherland the elder, was entitled to the remaining fifth; and the defendant Thomas Sutherland the younger is entitled, as her only son, to that fifth.

WALSH *v.* WALLINGER.

CHANCERY. 1830.

[*Reported* 2 *R. & Myl.* 78.]

THE testator, John W. Arnold Wallinger, by his will, dated the 19th of January, 1805, gave his personal estate to his wife, Matilda, for her own use and benefit, and devised all his real estates to trustees upon trust to sell the same, and, after deducting the expenses of the sale, and paying the encumbrances thereon, and all his just debts, to pay the residue "unto his said wife, to and for her own use and benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him in such manner as she should appoint."

The testator died on the 23d of January, 1805, leaving his widow, a son, and eight daughters him surviving.

By an indenture bearing date the 14th of February, 1817, to which John A. Wallinger the son was a party, the mother, in order to place him advantageously in partnership, appointed to him the sum of £1000, part of the residuary fund; and it was thereby declared and agreed between her and him, "that he the said John A. Wallinger should not be entitled to any further or other portion or share of and in the residue of the moneys arising from the sale of the real estate of John W. Arnold Wallinger deceased, unless the said Matilda Wallinger should, by any deed or deeds in writing, under her hand and seal, or by her

last will and testament, make any further appointment or disposition in favor of him the said John A. Wallinger from or out of the same." This sum of £1000 was raised and paid to the son.

Caroline, one of the daughters, died in 1828, without having had any part of the fund appointed to her.

The widow by her will, executed in May, 1828, reciting that two of the daughters were amply provided for, and that her son had already received £1000, which was as much as could be spared from the daughters, directed that these two daughters and the son should not have any share in her property, and appointed the residue of the trust moneys to her other five surviving daughters in equal shares.

The bill was filed by the five appointees and their husbands, and prayed that the will might be declared a valid execution of the power.

One question in the cause was, whether the widow could appoint to some of the children, totally excluding others.

Mr. Pemberton and *Mr. Longley*, for the plaintiffs.

Mr. Tinney and *Mr. Temple*, for other parties in the same interest.

Mr. Bickersteth and *Mr. Cooke*, contra.

The Master of the Rolls. [Sir John Leach.] The question is, whether the words, "in such manner as she shall appoint," import that the widow was to have the power to exclude any of the children, or merely that she was to give the property to them in such shares as she might think fit, and as might best suit their respective circumstances. If the direction had been, that at her death the property should go to the children as she should appoint, all the children, according to decided cases, must have taken. There is no sensible or substantial distinction between such a direction and the expressions which are used here. Therefore, all the children are entitled, who were capable of taking under an appointment by the mother.

Another question was, whether the personal representatives of Caroline, who died in the lifetime of the widow, were entitled to share in a part of the property which was unappointed by the will of the mother.[1]

The Master of the Rolls. Unless the interest be expressly given over in case of no appointment, those children only will take who could take by appointment.

The power here was plainly testamentary, and could be executed only in favor of children who could take by will; and the part unappointed must be divided between the children who were living at the mother's death.[1]

[1] See *Kennedy* v. *Kingston*, 2 Jac. & W. 431 (1821); *Re White's Trusts*, II. R. V. Johns. 656 (1860); *Freeland* v. *Pearson*, L. R. 3 Eq. 658 (1867).

FAULKNER *v.* WYNFORD.

CHANCERY. 1845.

[*Reported* 15 *L. J. N. S.* 8.]

ROBERT TAYLOR, by a codicil to his will, dated the 12th of July, 1801, gave all such sum and sums of money as he might have in any of the public funds or government securities at the time of his decease, unto W. D. Best and Henry Higgins, and the survivor of them, and the executors and administrators of such survivor, upon trust, that they should from time to time receive the interest and dividends, and pay the same into the hands of his (the testator's) daughter, Mary Ann Taylor, and to no other, or permit his said daughter to receive the same for and during the term of her natural life, and at her decease to receive the same to and for the use and benefit of all such child and children as she might leave, equally between them, share and share alike, at his and their ages of twenty-five years, in such manner and form as his (the testator's) said daughter should by deed or will direct; but in case she should leave no child at her decease, or they should die before the age of twenty-five years, that then the said trustees should pay the interest and produce from time to time into the hands of his (the testator's) daughter Bridget, and to no other, whether married or sole, during her natural life; and her receipts alone to be sufficient discharges; and from and after her decease, to pay both principal and interest to and amongst her children as she should by deed or will direct; but if she should leave no child living at her decease, or all die before their ages of twenty-five years, then the testator directed his trustees to divide both principal and interest to and amongst all the children of his (the testator's) nephews, Henry Higgins, William Higgins and John Higgins, share and share alike, at their ages of twenty-five years, and to and for and upon no other trust whatsoever.

The testator died in December, 1801. Mary Ann Taylor died in August, 1843, without ever having been married. Bridget, the other daughter, married a Mr. Abraham and had three children, two of whom only survived the testator, viz. Bridget Elizabeth, who died in 1817 aged twenty-eight years, and Robert T. S. Abraham, who survived his mother and died in November 1843, aged fifty-three years. Mrs. Abraham, the testator's daughter, died in March 1840, without having exercised the power of appointment given to her by the will. The bill was filed by the personal representative of R. T. S. Abraham against the surviving trustee named in the codicil, the personal representatives of Bridget Elizabeth Abraham and Mary Ann Taylor, and against the surviving children of the testator's three nephews, and the representatives of those who were dead; and it stated that the sum of £9,000 Consolidated Bank Annuities was standing in the name of the testator

at the time of his decease; and had since been transferred, and was then standing in the name of such surviving trustee; and it prayed that the plaintiff, as executor of R. T. S. Abraham, might be declared entitled to the whole of the fund; or if the court should be of opinion that he was not entitled to the whole, then, that the rights of the various parties interested therein might be ascertained, and for a transfer accordingly.

Mr. Swanston and *Mr. Hetherington*, for the plaintiff.

Mr. K. Parker and *Mr. Malins*, for the defendant, the representative of Bridget Elizabeth Abraham.

Sir F. Simpkinson, *Mr. Wray*, *Mr. Wood*, and *Mr. C. M. Roupell*, for other parties.

Wigram, V. C. The plaintiff in this case, who is the personal representative of R. T. S. Abraham, insists that, upon the true construction of the codicil, no part of the fund went to Bridget Elizabeth, who died in the lifetime of the tenant for life. It was admitted at the bar, that the interest of such of the children of Bridget as were objects of the power, was not dependent upon the execution of the power — *Burrough* v. *Philcox*, [5 Myl. & Cr. 73]; and that this was within the class of cases mentioned by Sir E. Sugden, where he says, "The gift is so framed as to contain within itself a power and a gift by implication." The question is, who were the objects of the power? Take a simple case: suppose an estate given to B. for life, with remainder as B., by deed or will, shall appoint; with remainder, in default of appointment, to the children of B.: it is clear that the children of B. would take in default of appointment, whether they died in the lifetime of B. or not. Is there anything in this case to exclude the same construction? According to the case of *Walsh* v. *Wallinger*, [2 R. & Myl. 78], those children only would take in default of appointment, who might have taken under the appointment; and accordingly where the power has been to appoint by will only, it has been decided that none who did not survive the donee of the power would take; upon the ground, it is said, that they could not have taken under the appointment; and to this class of cases may be referred *Kennedy* v. *Kingston*, [2 Jac. & W. 431]. The Master of the Rolls in his judgment in that case assumes the point which is in contest here. But, in the present case, the power to appoint is by deed or will. There is nothing therefore to oblige the tenant for life to suspend her judgment, as to the parties who shall take, till her death. This is the natural construction of the words, and gives effect to the intention expressed in the will to provide for the children of Bridget; and it would be irrational to suppose an intention, that, if both Bridget's children died in the lifetime of their mother, leaving children, neither of the families should take anything. It is enough to say (and this is not disputed) that if the very event has not happened upon which the fund is to go over, the limitation over will not take effect. In this case, one of the children of Bridget was living at the death of the tenant for life, and therefore the limitation over will

not take effect; and that clause is inoperative, except for the purpose of furnishing an inference of what the testator's intention was as to those children. Upon this point I am quite safe in relying upon the reasoning in the case of *Sturgess* v. *Pearson*, [4 Mad. 411], that where the gift is clear, and there is a gift over which is not so clear and decisive, there the court will give effect to the clear words, especially where the effect of that will be to support the clear intention of the testator. I have referred to several cases not mentioned in the argument — *Bradish* v. *Bradish*, 2 Ball & Beat. 479; *Nayler* v. *Wetherell*, 4 Sim. 114; *Skey* v. *Barnes*, 3 Mer. 335; and these cases support the view I have taken as to the true construction of the codicil. The fund will, therefore, be equally divided between the plaintiff and the representative of Bridget Elizabeth Abraham.

LAMBERT *v.* THWAITES.

CHANCERY. 1866.

[*Reported L. R.* 2 *Eq.* 151.]

THIS case came on upon demurrer for the purpose of raising a question upon the construction of a post-nuptial settlement, dated the 2nd of January, 1841, by which certain freehold property was conveyed to trustees upon trust to receive the rents, and pay the same to the husband Roger Williams, and his wife Jane Williams, during their lives, and to the survivor of them in manner therein mentioned, "and from and immediately after the decease of the survivor of them, the said Roger Williams, and Jane his wife, upon trust to make sale of the said messuages, hereditaments, and premises, with their appurtenances, and divide the same amongst all and every the children of the said Roger Williams, lawfully begotten, or to be begotten, in such shares and proportions, manner and form, in every respect, as should be directed and declared in or by any will or codicil or codicils to such will then already or at any time or times thereafter to be duly executed by the said Roger Williams, and to, for, and upon no other use, trust, and intent or purpose whatsoever."

Roger Williams had issue seven children, all of whom were alive at the date of the settlement, and all attained the age of twenty-one years. Alfred Williams, the eldest of these children, died on the 18th of September, 1856, having made his will on the 5th of May, 1855, and thereby given and bequeathed all his real and the residue of all his personal estate to the defendant J. Page, and the plaintiff W. J. Lambert, their heirs, executors, and administrators respectively, upon certain trusts for the benefit of his wife and children therein mentioned,

and having appointed Page and the plaintiff executors thereof. Jane Williams, the wife of Roger Williams, died in October, 1856. Roger Williams died in the month of May, 1862, without having executed the power of appointment by will or codicil reserved to him by the indenture of the 2nd of January, 1841.

The plaintiff submitted that, under the trusts of the said settlement, Alfred Williams took a vested interest in the hereditaments comprised therein and the proceeds of the sale, and that he was entitled to an equal seventh part thereof, and that such interest was now vested in the plaintiff and the defendant John Page; all the defendants except John Page insisted that the death of Alfred Williams in the lifetime of Roger Williams prevented his taking any interest in the hereditaments. The defendant Page, by reason of his being a trustee of the settlement as well as executor under the will of Alfred Williams, took no part in the contest between the plaintiff and the other defendants.

The bill prayed a declaration that Alfred Williams took a vested interest in the hereditaments comprised in the settlement of the 2nd of January, 1841, and that the trusts of the indenture might be carried into effect.

Mr. Glasse, Q. C., and *Mr. Lewin*, in support of the demurrer.

Mr. Baily, Q. C., and *Mr. Ellis*, for the plaintiff.

Sir R. T. Kindersley, V. C., after referring to the settlement and the facts of the case, continued:—

The question is whether, in default of execution of the power, the property is to be divided amongst the six children who survived the father, excluding Alfred, or among the seven, including him.

In order to determine this question it is necessary to bear in mind what has now become an elementary principle in the doctrine of powers, although at one time it was disputed, and indeed held the other way—I mean the principle that the existence of a power of appointment does not prevent the vesting of the property until, and in default of, execution of the power. The exercise of the power will divest the estate; but until the power is exercised, it remains vested in those who are to take in default of appointment. That is now perfectly well settled, and has been so ever since the well-known case of *Doe* v. *Martin*, 4 T. R. 39, in 1790. But where the instrument contains no express gift over in default of appointment, the difficulty is to determine who are to take in default of appointment. The general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but if the instrument does not contain a gift of the property to any class, but only a power to A. to give it, as he may think fit, among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the court implies an intention to give the property

in default of appointment to those only to whom the donee of the power might give it.

I will first refer to the case of *Walsh* v. *Wallinger*, 2 Russ. & My. 78. There a testator bequeathed the residue of his estate to his wife for her own use and benefit (so far it was an absolute gift to her). Then he added, "trusting that she will, at her decease, give and bequeath the same to our children in such manner as she shall appoint." In that case there is no gift in express terms to the children by the testator, nor is there any direction that they are to take in default of appointment; and therefore it can only be inferred from the power itself who are to take in default of appointment; and inasmuch as the power is only to be exercised by will, and therefore can only be exercised in favor of those children who shall be living at the wife's death, we are obliged to conclude that the intention of the testator was that those only who survived the wife should take in default of appointment. And so it was decided.

I will next refer to the case of *Kennedy* v. *Kingston*, 2 Jac. & W. 431. That was a bequest of £500 to Ann Rawlings for life, and at her decease to divide it in portions, as she should choose, among her children. She had four children, one of whom died; and then, when three were surviving, she made a will, giving the fund in certain proportions to those three. Afterwards one of those three died before her, so that only two survived her. It was held that the appointment to the three was perfectly good, and that the lapsed share would go to the two who survived; and for this reason: there was no direct gift by the testator to the children; the fund was given to her for her life, with a power at her decease to divide it as she liked among her children. That she could only do by her will; and of course none but those who survived her could take under her will; and therefore those only who survived her must be presumed to have been intended by the original testator to take in default of appointment.

Now I will refer to the case of *Casterton* v. *Sutherland*, 9 Ves. 445. That was a devise to the testator's wife for her life, and after her decease "unto and amongst all and every our children, in such manner and in such proportions as my said wife shall, either in her lifetime or by her last will, appoint." This case materially differs from the two former in this respect — that we have here in express terms a direct gift by the testator to the children; the gift is, after the decease of his wife, "unto and amongst all and every our children," and the power to the wife is to appoint the manner and proportions in which they should take. There were five children, and they all died before the wife, and there was no execution of the power. Sir William Grant decided that it was a tenancy in common among all the children in fifths, subject to the power of appointment. It is true that we have in this case an element which did not occur in the other cases, namely, that the power might have been exercised by deed or instrument in writing *inter vivos* as well as by will; and therefore it may be said

that the court would imply a gift to all the children, in default of appointment, from that circumstance alone, since all might have taken under an exercise of the power. That case is therefore not a decisive authority on the question.

There is another case of *Brown* v. *Pocock*, 6 Sim. 257, decided by the Vice-Chancellor of England. It was in effect a bequest to A. of £2 a week for life, with a direction that a sum should be set apart to answer these weekly payments; and after the death of A. there was power to A. to leave the sum to and for the benefit of his wife and children, in such manner as he should by will give and bequeath the same. There were four children of A. living at the death of the testatrix, of whom one died; and two others were born afterwards. The wife died before her husband A., the donee of the power. There was no valid appointment under the power, and the question was, to whom was the fund to go in default of appointment. Now here, it will be observed, there was no direct gift in terms by the testatrix to the wife and children, and only a power to A. to appoint by will, and yet it was held that the wife and children took in default of appointment as joint tenants, and therefore the surviving children were entitled to the fund. This case seems at first sight at variance with *Kennedy* v. *Kingston;* but the decision was evidently founded upon this circumstance, that the power was to be exercised, not merely for the benefit of an indefinite class of children, but also for the benefit of the wife, a living and defined individual, who was an object of the testatrix's bounty; and therefore it stood upon the same footing as if there had been a direct gift by the testatrix to the wife and children in such manner as A. should by will appoint; and so it was a vested interest in the wife and children, subject to being divested by the execution of the power.

In the case now before the court there is in express terms a direct gift to the children; and the power is only to appoint the shares and proportions, manner and form, in which they are to take; and it seems to me impossible to express in more definite, strong, and precise terms the intention of Roger Williams, the settlor, that every one of his children should take, subject only to the exercise of the power by will. No doubt, in the event of any of the children predeceasing him, he might have exercised the power in favor of the survivors, and it would have been perfectly good; because it is to be exercised by will only, and a will can only be made in favor of persons who survive the testator. But that does not prevent the property from vesting in the mean time in all the children, liable to be divested by the exercise of the power; and remaining so vested in default of execution of the power.

There are two cases to which I ought to refer, which were both decided by Lord Langdale, and which were cited by counsel in the course of the argument. One of them is *Woodcock* v. *Renneck*, 4 Beav. 190. That was a bequest of £1700 stock in trust to pay the dividends to A. and his wife B. for their lives and the life of the survivor of them, and

after their decease upon trust to transfer and pay over the stock to their children in such shares and proportions as the survivor of A. and B. should by will appoint. So here was a direct gift by the testator to the children of A., subject to a power which was to be exercised by will by the survivor of A. and his wife. The husband was the survivor; there were three children, but only one of them survived the husband. Then the husband made his will, and appointed the whole to that one child. Lord Langdale decided that that was a good appointment; and it is impossible to question the propriety of that decision. The power was to appoint by will, and could only therefore be exercised in favor of such of the children as should survive A., and there was only one surviving. But the Master of the Rolls very unnecessarily thought fit to consider the question, who would have taken in default of appointment; and having regard to the language being "their children," which, he said, although it *prima facie* means all children, still is a flexible term, and might mean the children living at the death; and having regard to the fact that the power was to be exercised by will, and to the words of the trust being "to transfer and pay over," he concluded, upon the whole, that in default of appointment the surviving child alone would have taken. I am bound to say that I should not have come to that conclusion myself; but, at all events, it was no more than an expression of opinion that the words "their children" may, from the context, be held to mean the children living at the death of the parent. But that does not touch the present case, where there is nothing to admit the construction that the children to whom the property is given are only those who should survive the parent; because we have here not only the words "all and every the children," which would be quite sufficient, but the words are, "all and every the children now lawfully begotten or to be begotten." It appears to me impossible to attribute any other intention to the settlor than to give the property to all the children then living, and to all who might come into existence afterwards, subject only to his power to control and vary their interests by his will.

The other case decided by the same learned judge is *Winn* v. *Fenwick*, 11 Beav. 438, where on marriage a fund was settled in trust for the husband for his life, and after his death, in case the wife survived him, in trust for her absolutely. But *in case the wife should die in her husband's lifetime, leaving one or more child or children then living*, then after the husband's death upon trust for all and every the child or children of the marriage, in such parts, shares, and proportions as the wife should by deed or will appoint; and *if there should be no issue of the marriage living at her decease*, then upon trust for such persons (generally) as she should by deed or will appoint, and, in default of such appointment, in trust for the husband. So that there was no gift to any child or children at all, except in the event of the wife dying in the lifetime of her husband, and leaving one or more child or children living at her death. And it will be observed that the power was to

appoint by deed *inter vivos* as well as by will. The wife did not exercise her power. She died in her husband's lifetime, and she had children, some of whom died in her lifetime and some survived her. The Master of the Rolls decided that those children only who survived the wife were entitled to the fund; but he came to that conclusion solely on the ground that the power to appoint was only to arise in the event of her dying before the husband, and leaving one or more child or children living at her death, taken in connection with the clause by which the property was to go to the husband in the event of there being no issue of the marriage living at her death. Whether his Lordship's decision in that case can be regarded as satisfactory may well be doubted. It certainly appears not to have been satisfactory to Lord St. Leonards, who observes upon that case — "It may be considered doubtful whether this construction gave effect to all the words of the settlement which the court intended to construe by implication." But whether the decision of the Master of the Rolls was sound or not, as it proceeded entirely on grounds which do not exist in the case now before the court, it can have no effect on the decision of this case.

I am of opinion that all the children, including Alfred, took the property in equal shares in default of appointment, and that therefore the demurrer must be overruled.

IN RE PHENE'S TRUSTS.

CHANCERY. 1868.

[*Reported L. R. 5 Eq.* 346.]

EDWARD PHENE, by his will, dated the 2nd of November, 1836, bequeathed to his executors the sum of £3000 £3 per cent Reduced Annuities, upon trusts for the benefit of his sister Charlotte Mill during her life; and from and immediately after her death "in trust for the benefit of her children, to do that which they, my executors, may think most to their advantage."

Charlotte Mill died on the 28th of May, 1867, having had issue five children, two of whom died in her lifetime. Of the other three, one had not been heard of for many years, another died in January, 1868, and the third was still living.

The executors named in the will died in the lifetime of Charlotte Mill, and the fund was after her death transferred into court by the legal personal representatives of the surviving executor.

A petition was now presented by the surviving child of Charlotte Mill for payment or transfer to him of such share of the fund as he was entitled to under the will of the testator.

Two questions were raised: 1. Whether the children who predeceased the tenant for life took any interest in the fund; and 2. If they

did not, whether the children who survived the tenant for life took as tenants in common or as joint tenants.

Mr. Bagshawe, for the petitioner.

Mr. Bristowe (*Mr. Kurslake*, Q. C., with him), for the representatives of the deceased children.

Lord Romilly, M. R. I think it is very clear that only the children who survived their mother take, and that they take as tenants in common.

The case of *Brown* v. *Higgs*, 8 Ves. 561, shows that a testator may give to his executors an arbitrary power of determining to whom a fund shall go; and that if he does so, this arbitrary discretion can be exercised only by the persons to whom it is given; even the court cannot exercise it. The testator may also say that the discretion shall be exercised at a particular time; and I think he does so here by fixing the time when the fund is to become divisible. Again, you must consider who are the objects of the discretion; they must be persons in existence at the time when the discretion is exercised; the discretion cannot be exercised for the benefit of a dead person.

Now, the gift here is from and after the death of the tenant for life, for the benefit of her children, to do that which the executors might think most to their advantage. I think that gives the fund to the executors to divide among the class of children who survive the tenant for life. The court is performing the office of the executors, and must give it to the same persons.

Then the testator says to his executors, "You may give it amongst that class as you think fit." That does not create a joint tenancy, because his meaning clearly is, that the executors are to divide the fund; and the court, standing in their place, must also divide it, that is, give it to the objects of the testator's bounty as tenants in common.

WILSON *v.* DUGUID.

Chancery Division. 1883.

[*Reported* 24 *Ch. D.* 244.]

Special case. By an indenture dated the 21st of May, 1833, and made between Robert Keeling the elder of the one part, and William Duguid and Robert Keeling the younger of the other part, after reciting, among other things, that Robert Keeling the elder being desirous of making some provision for his daughter, Sarah Duguid, the wife of the said William Duguid, and also for the said William Duguid and Robert Keeling the younger, and otherwise as thereinafter mentioned, had determined to assign certain leasehold premises to which he was entitled for the residue of a term of ninety-five years from Midsummer,

1811, upon the trusts and for the purposes thereinafter mentioned, Robert Keeling the elder assigned the said leasehold premises to William Duguid and Robert Keeling the younger upon trust to pay the rents and profits thereof to the said Sarah Duguid for her life for her separate use, and from and after her decease in the lifetime of the said William Duguid to pay the same to him for life, and from and after the decease of the survivor of them, the said William Duguid and Sarah his wife, upon trust to assign the said premises unto and amongst such of the children of the said William Duguid and Sarah his wife then living, in such manner, shares, times, and proportions as the said William Duguid and Sarah his wife jointly, or the survivor of them separately, should by any writing appoint, and in case there should be no such child or children, then upon trust for the said Robert Keeling the younger for life, and after his decease upon trust to assign the said premises unto and amongst such of his children, and in such manner, shares, times, and proportions, as he should by any writing appoint.

Sarah Duguid died in 1876 without leaving issue.

William Duguid died in March, 1880.

Robert Keeling the younger died in 1863, having been only once married, namely, in the year 1817, and having had ten children and no more.

It appeared that of such ten children three died before 1863, two after 1863 and before 1876, one after 1876 and before March, 1880, and one after March, 1880.

Robert Keeling the younger never exercised the power of appointment given him by the deed.

A question having arisen whether all the children of the said Robert Keeling the younger living at the date of the before mentioned settlement or born afterwards, and the representatives of such of them as had died, were entitled to the said trust premises as tenants in common, or whether only such of the children of the said Robert Keeling the younger as were living at the death of the said William Duguid, the last surviving tenant for life, were so entitled, the question was submitted to the consideration of the court who were the persons entitled beneficially to the trust premises assigned by the deed of the 21st of May, 1833, and for what extent and interests were such persons entitled.

F. A. Lewin, for the children of Robert Keeling the younger, who survived William Duguid, the last tenant for life, and the representatives of deceased children who survived William Duguid.

Bonser, for the children of Robert Keeling the younger who survived him and died in the lifetime of William Duguid.

H. Warlters Horne, for the children of Robert Keeling the younger who died in his lifetime.

CHITTY, J. The question in this case is, what children of Robert Keeling could take, whether all his children or those only who were living at his death, which occurred in 1863, or those only who were

living at the death of Sarah Duguid in 1876, or those living at the death of William Duguid, who died in 1880.

By the settlement, after a recital that the settlor being desirous of making provision for his daughter Sarah and also for William her husband, and Robert Keeling the younger, had determined to assign the premises, certain leasehold premises were assigned upon trust for Sarah for her separate use for life, after her death to William her husband for his life, and after the death of the survivor upon trust to assign the premises unto such of the children of William and Sarah his wife then living, in such manner, shares, times, and proportions as the said William Duguid and Sarah his wife jointly, or the survivor of them, should by any writing appoint. The trust there is for the children living at the death of the survivor, "and in case there should be no such child or children, then upon trust for the said Robert Keeling the younger for his life, and after his decease upon trust to assign the said premises unto and amongst such of his children and in such manner, shares, times, and proportions as he should by any writing appoint." There is obviously a distinction between the trusts for the children of William and Sarah, and the trusts for the children of Robert; the trusts for the children of William and Sarah being only for those living at the death of the survivor, and those words being omitted in the trusts for Robert Keeling the younger.

On the true construction of this settlement, so far as relates to the children of Robert Keeling the younger, I hold that there is a trust for all the children of Robert in equal shares, subject to a power of selection and distribution exercisable by him either by deed *inter vivos* or a testamentary instrument. That appears to me to be the plain construction of the words I have read. The whole of the property is vested in trustees, there is contained a trust in the words "upon trust to assign" distinguishable from the power which is conferred upon Robert Keeling the younger. The objects of the power are not any of the children, though there is a power of selection and a power to exclude, not particular children of Robert, but all his children. There is no time limited for the execution of the power, and it was not more or less his duty to exercise the power just before his death than it was to exercise it at any other time.

If it is necessary to resort to technical reasoning, I hold that there is a plain implication arising from the words I have read of a trust in default of appointment for all the children of Robert. I do not think it is necessary to refer to the other technical grounds put forward in some of the cases on the subject, namely, that there was a power which it was the duty of the trustees to exercise, and the court could only fasten upon the power in this way, that there would be no breach of the duty which is annexed to the power until the death of the donee of the power. To apply that reasoning to this case appears to me to strain the true meaning of this instrument.

In *Brown* v. *Higgs*, 4 Ves. 708, the provision was to apply the re-

mainder of the rent "to such children of my nephew Samuel Brown as my said nephew John Brown shall think most deserving, and that will make the best use of it, or, to the children of my nephew William Augustus Brown, if any such there are or shall be." That case was twice argued before the then Master of the Rolls, and he held that all the children of Samuel Brown and the children of his nephew William Augustus Brown were entitled. He said (4 Ves. 719), "The fair construction is, that at all events the testator meant it to go to the children, and these words of appointment he used only to give a power to John Brown to select some and exclude the others." That point came before Lord Eldon on appeal, and he observed at the end of his judgment (8 Ves. 576), that he entertained doubts on the construction of the instrument before him, and would never cease to entertain those doubts, still he affirmed the decree of the Master of the Rolls, and that decree was also affirmed in the House of Lords (18 Ves. 192).

It appears to me that that decision is in point. The reasoning which Lord Eldon applies in his judgment in *Brown* v. *Higgs*, 8 Ves. 571, to *Harding* v. *Glyn*, 1 Atk. 469, ought not in my opinion to be applied to the case before me.

In *Burrough* v. *Philcox*, 5 Myl. & Cr. 72, Lord Cottenham, speaking of this class of cases, said, Ibid. 92, "These and other cases show that when there appears a general intention in favor of a class, and a particular intention in favor of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class," and upon the authority of *Brown* v. *Higgs*, 8 Ves. 561, he thought himself justified in giving effect to the intention, which appeared to him to be sufficiently apparent upon the will, of giving the property to the nephew and nieces and their children, subject to the selection and distribution of the survivor of the son and daughter. And he said (5 Myl. & Cr. 95), "they all constitute the class to take all the property as to which no such selection and distribution has been made." The case of *Duke of Marlborough* v. *Godolphin*, 2 Ves. Sen. 61, though it is a decision of Lord Hardwicke, would not be followed in the present day. Lord St. Leonards at page 592 of his book on Powers says: "There is no doubt a clear distinction between *Harding* v. *Glynn*, 1 Atk. 469, and *Duke of Marlborough* v. *Godolphin*, as in the former case the interest was wholly vested in the donee of the power, and in the latter she was expressly made tenant for life, but in both the donee had a power of selection, and the terms of the power in the latter case manifested an intention that the objects should not be disappointed." Then he quotes the words: "To his wife for life, and after her decease to be divided and distributed amongst such of his children as she should appoint. Now as the right to exclude some does not prevent the class from taking in default of appointment, it should seem that if a case in the very terms of *Duke of Marlborough* v. *Godolphin* were now to occur it would be decided that the children took as tenants in

common in default of appointments, either by implication, which seems the true construction" — and with respect that is the construction I prefer to adopt on the reading of the instrument before me — "or," he adds, "because the power was coupled with a trust." That passage is quoted, apparently with approval, by Lord Hatherley in his judgment in *Salusbury* v. *Denton*, 3 K. & J. 536.

The principle which Vice-Chancellor Kindersley laid down in *Lambert* v. *Thwaites*, Law Rep. 2 Eq. 155, appears to me to apply to this case. There are cases which are plainly distinguishable, such for instance as *In re Phene's Trusts*, Law Rep. 5 Eq. 346, before Sir John Romilly, where on the true construction of the terms used, he considered that a personal enjoyment was intended by the persons who were the objects of the power, and that being so, he considered himself justified in holding that only those who were living at the time of the death of the donee of the power were entitled to the fund. And the case of *Re White's Trusts*, Joh. 656, before Lord Hatherley, is a case to be referred to the same principle.

The cases on "relations" are very peculiar. It is now established that where there is power to appoint among relations so as to give the donee of the power the right of selection — the donee of the power can appoint to any relations, but in modelling the trusts to be applied in default or arising from the power being coupled with the duty, the court has found itself under the necessity of confining the class of relations to a particular set of relations, and has adopted the rule that relations who take in default of the exercise of the power in that case are those who are next of kin according to the Statute; they take as tenants in common, but not in the shares defined by the Statute. Those cases are treated by Lord St. Leonards in a separate chapter, and seem to stand on their own special footing, and I do not consider that I am called upon to say whether I should or should not follow the case of *Attorney-General* v. *Doyley*, 2 Eq. C. Ab. 195. The case is shortly reported, and it is enough to say that it is a case on relations, and that in deciding the case the Master of the Rolls considered that there could be "no representation of those relations who died in his lifetime," and he held that as to the personal estate there could be no representation of those relations who died in the niece's lifetime, for before her death no part thereof vested in any of the relations, and it was contingent whether they would be entitled thereto or not. I say it is not necessary for me to say whether I should or should not follow that case, or whether it would be followed in the present day. It appears to me, for the reasons I have mentioned, to be plainly distinguishable from the case I have now to decide.

I hold, therefore, that all the children of Robert take as tenants in common in equal shares. I will direct the leasehold house to be sold, as it would be absurd to divide it amongst all the children as tenants in common, and the costs may be a charge on the proceeds.

SECTION V.

WHAT WORDS EXERCISE A POWER.

SIR EDWARD CLERE'S CASE.

1599.

[*Reported* 6 *Co.* 17 *b.*]

[See this case given p. 333 *ante.*]

ANDREWS *v.* EMMOT.

CHANCERY. 1788.

[*Reported* 2 *B. C. C.* 297.]

BY a settlement bearing date 8th December, 1775, made previous to the marriage of John Andrews, deceased, with the plaintiff Elizabeth Andrews (then Elizabeth Bromley) late his wife, and now his widow, a sum of £3000 Three Per Cent Reduced Bank Annuities, was conveyed to trustees, in trust to permit Elizabeth to receive the dividends, &c. till the marriage; and, after the solemnization thereof, to pay the interest to the husband for life, and, after his decease, in case the plaintiff should survive him, to raise £500 and pay the same to plaintiff to her own use, and to pay the interest of the residue to the plaintiff for life, and, after the decease of both, to distribute such residue among the children of the marriage, in such manner as therein mentioned, and in case there should be no child (which was the case which happened) upon trust, to transfer the stock to such persons, and in such shares, &c. as the said John Andrews should by deed or will appoint; and, in default of such appointment, to such persons, &c. as the plaintiff should by deed or will appoint, and, in default of appointment, to the executors or administrators of the plaintiff: and the husband, by the same deed, covenanted, that the wife, in case she should survive him, should have her paraphernalia, and should also have all the rents, dividends, &c. of the real and personal estate, that he should die seised or possessed of, from the time of his decease for her life.

The marriage took effect, but there was no issue.

On the 11th of March, 1776, John Andrews made his will, and, thereby, gave to his wife all the wine, &c. which should be in his house at the time of his decease, and the use of his plate, &c. during her life, and, after her decease, he directed that what should remain thereof

should sink into the residue. He then gave several legacies, to be paid after the decease of his wife. "And all the rest and residue of his moneys, and securities for money, goods, chattels, and personal estates whatsoever and wheresoever, and of what nature, kind, or quality soever, from and after the death of his wife, he gave and bequeathed unto John Emmot (the defendant), his executors and administrators, to and for his and their use and benefit forever."

John Andrews, the testator, died in 1779, without revoking or altering the will.

The plaintiff filed this bill to have the £3000 Three Per Cent Reduced Bank Annuities transferred to her, as not having been appointed by the testator, her husband.

The defendant contended, by his answer, that the testator had by his will executed his power: that the will was made with a view to, and in compliance with, the marriage settlement; and that the legacies amounting to more than the estates and chattels of the testator (after payment of debts) would be sufficient to satisfy, he could have no benefit of the residuary clause, unless the testator had thereby executed his power.

The cause came on at the Rolls, the 11th of May, 1785, when it was referred to the master to take an account of the personal estate of the testator (other than the £3000) at the time of making the will, and of the debts, funeral expenses, and legacies; and whether his personal estate (after payment of debts, &c.) was sufficient to pay the legacies. On the 10th of March, 1787, the master made his report, stating, that the personal estate of the testator, at the time of his death, was insufficient to pay the legacies by the sum of £664 1*s.* 5*d.*; but he did not make any report as to the amount of testator's property at the time of making the will.

The cause now came on for further directions, on the question whether the testator's will was an execution of the power.

Mr. Selwyn, *Mr. Hardinge*, and *Mr. Hood*, for the plaintiff.

Mr. Scott and *Mr. Lloyd*, for the defendant.

[*Sir Lloyd Kenyon*, M. R., made a decree for the plaintiff; his opinion is omitted.]

From this decree an appeal was brought before the Lord Chancellor, when *Mr. Selwyn*, *Mr. Hardinge*, and *Mr. Hood* again argued for the plaintiff, that the will was not an execution of the power; *Mr. Scott*, *Mr. Graham*, and *Mr. Lloyd*, for the defendant, that it was.

Lord Chancellor [Thurlow]. I think this case does not amount to a probable argument. With respect to the evidence, when the case came back his Honor thought the reference immaterial; and I think it is so. The testator, under the settlement, was competent to make a will, as to so much of his property as should remain after the death of his wife: the question is whether, in making that will, he has executed the power against his wife, whose property the fund was. It is necessary, in order to do this, that he should, by his will, notify his intention

to do it. It is too late now to expect that a testator, in order to execute a power, shall make an express reference to it; because it has been determined that, if a man disposes of that over which he has a power, in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power. But the doctrine is not carried, by any case, further than this, and it would be cruel to do it; as it would be throwing the property of testators into utter confusion. Then you must not go out of the instrument itself, to gather the construction of it. I do not mean by saying this to exclude the rule, that where there is what has been called a latent ambiguity in the will you shall not go out of the will to explain the testator's intention by circumstances; but to inquire into the testator's situation, in order, from thence, to gather what is probable he meant, is a great deal beyond that. Here the testator has made a will by which it does not appear he recollected the settlement made upon the marriage, at least there is only one circumstance, the postponement of the residue till after the death of his wife, by which he appears to remember it; for I do not rely on the argument of those who insist, that from the attestation of the will by two witnesses, he intended to execute the power.

Decree affirmed.[1]

STANDEN *v.* STANDEN.

CHANCERY. 1795.

[*Reported* 2 *Ves. Jr.* 589.]

CHARLES MILLAR by his will gave the sum of £200 to trustees upon trust to place "Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen now residing with a company of players," apprentices, as the trustees should think fit. The testator then directed his real estate to be sold; and gave the money arising from the sale and the residue of his personal estate in trust for his wife for life; and after her decease as to one moiety for such person or persons as she should by any deed or writing or by will with two or more witnesses appoint, and for want of appointment, for "all the legitimate children of Charles Standen living at his decease, share and share alike;" and if but one, then for that one; "and if it should happen, that there should be no legitimate child of Charles Standen living at his decease," then for William Seward, one of the trustees, his executors and administrators. The testator gave the other moiety in trust for "Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen," equally between them, share and share alike; with survivorship between them

[1] See *Nannock* v. *Horton*, 7 Ves. 391 (1802).

in case of the death of either before the age of twenty-one or marriage; and if it should happen, that both of them should die before the age of twenty-one or marriage, then he gave it in trust for "such legitimate children of Charles Standen" as should be living at the decease of the survivor of those two, share and share alike; if but one, for that one; and if there should be no such child living at the decease of the survivor, or all should die before the age of twenty-one or marriage, then for William Seward, his executors and administrators; and he appointed his trustees with his wife to be his executors.

The real estate was not sold. The testator's widow received the rents and profits and the produce of the personal estate for her life; and by her will, after disposing of some specific articles and a gold watch and some jewels, which she described to have been her husband's, she gave the residue thus: "All the rest, residue and remainder of my estate and effects of what nature or kind soever and whether real or personal, and all my plate, china, linen and other utensils, which I shall be possessed of interested in or entitled to at the time of my decease, subject to and after payment of all my just debts, funeral expenses and charges of proving my will and specific legacies, I give to my worthy friend Samuel Howard for his own use and benefit; and I do appoint him my executor."

This will was attested by three witnesses. The testatrix had no other real estate than that directed by her husband's will to be sold. Charles Standen in 1755 married Anne Lewis. The defendant Charles Standen, the only issue of that marriage, was born in 1758. There was an objection to the validity of the marriage; and the parties after cohabitation for six or seven years separated under articles of agreement; and Anne Lewis went by her maiden name. In 1769 Charles Standen the father married Anne Gooch; who lived with him as his wife till her death. Charles Millar Standen, Caroline Elizabeth Standen, and others, children by the second marriage, were the plaintiffs.

Under a reference to the master, Charles Standen the defendant was reported the only legitimate child. Afterwards an issue was directed; and the verdict was in his favor. Lord Thurlow being much dissatisfied with the verdict directed another trial; in which there was also a verdict for the defendant Charles Standen. Upon the equity reserved the questions were, first, whether the plaintiffs Charles Millar Standen and Caroline Elizabeth Standen were entitled to the interests under the will of Charles Millar given to them by name, but under the wrong description of legitimate children; secondly, whether the residuary clause in the will of Mrs. Millar was a good execution of her power of appointment under the will of her husband; if not, thirdly, whether the plaintiffs were entitled to share with the defendant Charles Standen under the trust, for want of appointment of that moiety, for all the legitimate children of Charles Standen. Evidence of conversations with the person, who drew Mrs. Millar's will, to show she had no other

real estate than that directed by her husband's will to be sold, was rejected.

Attorney-General [*Sir John Scott*] and *Mr. Hollist*, for the plaintiffs.

Mr. Lloyd, *Mr. Graham*, and *Mr. Onslow*, for the defendant, Charles Standen.

Solicitor-General [*Sir John Mitford*] and *Mr. Mansfield*, for the personal representative of Mr. Howard.

June 9. Lord Chancellor [Loughborough]. As to Charles Millar Standen and Caroline Elizabeth Standen the question is not very great; for a wrong description certainly will not take away their legacies. The argument is a strong one, that if he meant those two as legitimate children, he must mean all subsequent children of the same marriage to be legitimate; and yet I do not know how to bring them in as legitimate children when they are not so.

June 10. Lord Chancellor. The point as to legitimacy does not arise; for after the best consideration I am clearly of opinion, that the disposition made by Mrs. Millar affects that interest given to her by the will of her husband; and therefore no part of the estate belongs to the defendant Charles Standen. I have looked into the two cases cited against this construction; and those determinations are perfectly right.

In *Andrews* v. *Emmot* the will upon the view of it could not give to any person an idea, that the testator had the least relation to any interest he took, limited as that interest was, by the settlement upon his marriage. By that settlement a sum of £3000 stock was conveyed to trustees in trust for the husband for life; and after his decease, if his wife should survive him, to pay £500 to her for her own use and the interest of the residue to her for life; and after the decease of both to distribute such residue among the children of the marriage; and if there should be no child, to transfer the same as the husband should by deed or will appoint. Three months after the marriage the husband made his will; and at that time it was not natural to suppose, his object was to dispose of that interest; for he had no disposable interest in the property; he had a mere contingency in default of issue, that would give him a right to appoint. The will was a plain will, giving after the death of his wife some legacies, and the residue in general terms to Emmot. He lived three years afterwards; and at his death there was no issue. The claim was set up to £2500 part of the £3000 as passing under that will; and it was set up solely upon this ground, (for there were no words at all relating to it) that he had left such legacies, as could not otherwise be paid than by taking in this fund. The argument was perfectly weak: first, he was not to be in receipt of that sum till after the death of his wife and in the event of there being no children; therefore it was not to be relied upon for payment of the legacies; but independent of that the amount of the legacies could not be an indication of the state of his personal property. An inquiry as to the amount of his property at the time of making the will was

refused very properly both by Lord Kenyon and Lord Thurlow; for it is too vague to calculate, that a man must be supposed to attach a contingent interest, not fairly to be deemed a property, merely because his calculation as to what he might die possessed of had eventually failed. Then put that out of the case: it would be harsh enough as against a wife to suppose him to execute this power, where *prima facie* no intention to execute is indicated.

The case in the Common Pleas is still more distinct. The money was not at all the property of the testatrix. It was to be paid not to her executor, but to such person as she should appoint. It was claimed by the same person, executor and residuary legatee. Nothing can go as part of the residue, that would not go to the executor; and clearly there the executor was not entitled; it was made payable to her appointee purposely to exclude the executor. How does this case stand? It is material to consider, what the interest was, that she took under her husband's will, and what has she done. She was entitled for life to the income of all the residue of his real and personal estate; and a moiety was given to her absolute disposal by any deed or writing or by her will attested by two witnesses. She was not limited as to objects; and as to the mode it was as ample a latitude, as any one could have. It is a little hard to attempt to explain, that it was not her estate. How could she have had it more than by the enjoyment during life and the power of disposing to whatever person and in whatever manner she pleased with the small addition of two witnesses. By her will she gives all her estate and effects. It is hard to say, that using that expression she meant to distinguish, and not to include, this; which is as absolutely hers as any other part of her property. But the person, who drew the will, goes on with augmentative phrases "of what nature or kind soever, and whether real or personal:" these words do not add much to the force of it: "which I shall be possessed of interested in or entitled to." It is admitted there would be no doubt, if she had said, "of which I have power to dispose." Those last words would not add much after what she said before. But take it according to the strict technical rule in *Sir Edward Clere's Case,* that a general disposition will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition. Mrs. Millar had no other real estate. I am bound to satisfy all these words upon the technical rule. I can satisfy them no other way. I cannot avoid supposing what every one must be convinced she meant, that she made no difference between what she had from her husband and her other property. Therefore there is no difficulty as to this moiety; and the other belongs to Charles Millar Standen and Caroline Elizabeth Standen.[1]

[1] The decree was affirmed in the House of Lords, 6 Bro. P. C. (Toml. ed.) 193.

"The only case, which appears to be any kind of authority, is that, which is relied on, *Standen* v. *Standen;* and certainly the argument of Lord Rosslyn does go the length, that the very same words, that are sufficient to dispose of a person's own prop-

JONES *v.* TUCKER.

CHANCERY. 1817.

[*Reported* 2 *Mer.* 533.]

MARY MONES, by her will, gave and devised all her freehold and copyhold estates to the use of the defendant Tucker, his heirs and assigns, upon trust to permit Elizabeth Smith, widow, to receive the rents, &c. for her life, for her own use and benefit; and, after her death, upon trust to sell and dispose of the same, and out of the produce thereof (among other things) to pay, and the testatrix thereby bequeathed, £100, "to such person or persons as the said Elizabeth Smith should by her last will appoint;" and, subject to the payment thereof, and of certain other sums thereby given, the testatrix gave and devised the said estates to the defendant, his heirs and assigns, and appointed him sole executor.

Elizabeth Smith survived the testatrix Mary Mones, and made her will as follows: "I will and bequeath to Mrs. Mary Jones (the plaintiff) the sum of £100, likewise the whole of my household furniture,

erty, are sufficient to dispose of property, over which he has an absolute power of appointment.

"If that would be sufficient, there is no distinction between power and property. The distinction is perhaps, slight which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will. But that distinction is perfectly established; that in the latter case the property vests. A gift to A. and to such person as he shall appoint, is absolute property in A. without an appointment; but, if it is to him, for life and after his death to such person as he shall appoint by will, he must make an appointment, in order to entitle that person to anything. If that distinction exists, it is impossible, that the power can be executed by the very words, by which property is given.

"I agree, that the decision in the case of *Standen* v. *Standen* is right; and admit it as a binding authority. I dissent only from the argument, upon which the Lord Chancellor proceeds. The decision appears to me to be right upon the argument of the counsel; for Lord Redesdale and Sir James Mansfield do not put the case at all upon the ground, upon which the Lord Chancellor rests. They contended, that the power was well executed; but upon special grounds; depending on the circumstance, that the will was attested by three witnesses, with reference to her power to dispose of that estate. Upon that argument the decision is perfectly right; for it is evident, the testator is applying her will to the subject of her power, and if I find that she is speaking of the subject of her power, an express reference to the power is not necessary." — *Per* SIR WILLIAM GRANT, M. R., in *Bradly* v. *Westcott*, 13 Ves. 445, 452, 453 (1807).

"The case of *Standen* v. *Standen* has established that with regard to real estate, the court may examine whether the circumstances of the testator's property are such as to give effect to the will; and if this will had contained an unequivocal devise of realty, the court, under the authority of that decision, must, in order to give operation to an instrument, which would otherwise be inoperative, have resorted to the fund the subject of the power." — *Per* SIR THOMAS PLUMER, M. R., in *Jones* v. *Curry*, 1 Swanst. 66, 72 (1818).

plate, and linen, &c. Whatever remains to me for rent from Mr. Tucker, is to discharge my rent and funeral. I likewise appoint the aforesaid Mary Jones to be my sole executor. And if the said Mary Jones should decease, her husband Mr. Richard Jones to execute instead."

Elizabeth Smith died on the 7th of March, 1814, and the plaintiff Mary Jones proved the will.

The bill, charging that Elizabeth Smith, at the time of her death, was not possessed of, or entitled to any personal estate whatever, except a few articles of household furniture, which were shortly afterwards sold by the plaintiffs for £13, and the produce applied in payment of her funeral expenses; and that she had often, before she made her will, expressed and declared it to be her intention to give to the plaintiff Mary Jones the sum of £100, over which the power of appointment was given her by the will of Mary Mones; and that, in making her will, she particularly instructed the person who prepared it, that the said sum of £100, so charged on the freehold and copyhold estates, should be thereby disposed of and given to the plaintiff; prayed that the defendant might be decreed to pay the same accordingly; or that so much of the three per cents. (wherein the produce of the estates sold had been invested) as was necessary, should be sold, and the £100 paid thereout.

The defendant, by his answer, submitted that the £100 given by the will of Elizabeth Smith was not an appointment of the £100 under the will of Mary Mones, but a general legacy; and said that, so far from having made (in the defendant's presence, or to his knowledge) any such declarations of intention as in the bill stated, Mrs. Smith had, since the date of her will, expressed a wish to sell the reserved sum of £100, and had even offered the same for sale accordingly.

No evidence was gone into; and the bill not having put in issue the fact that Mrs. Smith had no other property but the furniture, which was sold, *at the time of making her will*, a motion had been made before the Lord Chancellor, for liberty to amend, by inserting a charge to that effect; but which was refused, the cause being already set down for hearing; and it now came on to be heard upon bill and answer.

Sugden, for the plaintiffs.

Cooke and *Dowdeswell*, for the defendant.

THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] Although the property in dispute, in this case, is of little value, the question is of considerable importance. With reference to the general rule, to which it is sought to make it an exception, it is, assuming the statement to be true, perhaps as strong a case as can be brought before the court. If a person, having no property at all, and only a power over a certain sum of money, gives that single sum, little doubt can arise as to the intention. But the question is, how we can get at the fact, and whether there can be an inquiry for the purpose of ascertaining it. In *Andrews*

v. *Emmott*, 2 Bro. 297, in the first instance, the court did direct an inquiry into the state of the property, at the time of the will being made, as well as at the time of the death. But, when the cause came on for further directions, the Master of the Rolls seems to have been of opinion, that the *quantum* of property was not a fit subject for inquiry. I agree that that was a weaker case than the present. It was not asserted that the testator there had no personal property, but only that he had not enough to pay all he had given; which is but a slight circumstance as an indication of intention. Here it is alleged, that the testatrix had no property, except a few articles of household furniture, which she has specifically bequeathed. Some property, however, she had. She speaks of rent due to her, as well as household furniture, plate, and linen. Then, what is to be the *quantum* of property that shall furnish the criterion for deciding whether a testator, making a bequest, is or is not exercising a power? It is not like an inquiry whether there be anything but copyhold to answer a devise of land. The question there is, whether there was anything for the will to operate upon at the time when it was made? A will of personalty speaks at the death. The state of that description of property at the time of the will, does not furnish the same evidence as to the intention.

In the case of *Nannock* v. *Horton*, 7 Ves. 398, the Lord Chancellor, referring to *Andrews* v. *Emmott*, and other cases of that class, takes it to be settled "that you are not to inquire into the circumstances of the testator's property at the date of the will, to determine whether he was executing the power or not."

In my own private opinion, I think the intention was to give the £100, which the testatrix had a power to dispose of; but I do not conceive that I could judicially declare the power to have been executed, even if the result of an inquiry should verify the representation that is made as to the state of her property.

Bill dismissed.[1]

LEWIS *v.* LEWELLYN.

CHANCERY. 1823.

[*Reported T. & R.* 104.]

By indenture of settlement, dated the third of January, 1809, and made previous to the marriage of Morgan Lewellyn and Margaret Williams, certain freehold and copyhold estates were limited, to the use of the said Morgan Lewellyn for life, with remainder to the use of the

[1] *See, accord., Webb* v. *Honnor*, 1 Jac. & W. 352 (1820); *Davies* v. *Thorns*, 3 De G. & Sm. 347 (1849).

Contra, *White* v. *Hicks*, 33 N. Y. 383 (1865); and see *Munson* v. *Berdan*, 35 N. J. Eq. 376 (1882).

said Margaret Williams, afterwards Margaret Lewellyn, for life, with remainder to the use of such person or persons, and for such estate and estates, and for such trusts intents and purposes, and charged and chargeable in such manner and form, as the said Morgan Lewellyn, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, or any writing in the nature of a will, or any codicil or codicils, to be by him signed sealed and published in the presence of and to be attested by three or more credible witnesses, should direct limit or appoint; and in default of appointment, to the uses therein mentioned.

The said Morgan Lewellyn by his will, dated the 2d of February, 1814, duly executed and attested so as to pass freehold estates, directed that all his just debts, as well by specialty as by simple contract, funeral and testamentary expenses, should be paid as soon as conveniently might be after his decease, and charged all his freehold copyhold and leasehold estates thereinafter mentioned with the payment thereof; and subject thereto, he devised and bequeathed all his real and personal estates to his brother Charles Lewellyn, one of the defendants, his heirs executors administrators and assigns, according to the nature of the property respectively, and appointed the said Charles Lewellyn sole executor of his will.

The testator had no other copyhold estates except those which were comprised in the settlement, but he had other freehold estates.

After the death of the testator, the bill was filed by his creditors, praying that the usual accounts might be taken of the personal estate, and that it might be declared that the will operated as an appointment of the freehold and copyhold estates comprised in the indenture of settlement; and that the whole, or a sufficient part thereof, might be sold to pay the testator's debts in aid of his personal estate.

The defendant Morgan Lewellyn, who claimed through the person entitled under the settlement in default of appointment, by his answer claimed such interest in the settled estates, as the court might consider him entitled to.

Mr. Shadwell and *Mr. Bickersteth* for the plaintiffs.

We admit that there can be no question as to the freehold estates: but the testator not having had any other copyhold estates than those comprised in the settlement, the words of the will must as to the copyhold estates be considered as an execution of the power, since otherwise they would be wholly inoperative, *Standen* v. *Standen*, 2 Ves. J. 589. The distinction is clearly settled, that in the appointment of personal estate by will, there must be some reference to the power, because every person is possessed of some personal property, and the court will not inquire into the *quantum:* but in the case of real estate, the court will resort to the power, although the devise be general, if it finds that there is no property to satisfy the will, except what is subject

to the power, *Bennett* v. *Aburrow*, 8 Ves. 609; *Jones* v. *Curry*, 1 Swanst. 66.

Mr. Sugden and *Mr. Knight*, for Morgan Lewellyn.

The court cannot make the words of the will operate in two different ways: the same words cannot operate as an appointment of the copyhold, but as a general devise only of the freehold estates. Nothing is so common as for persons to include copyholds in their wills, when they have none, because subsequently acquired copyholds will pass by a will without a republication.

Best, J. The question in this case is, whether the clause cannot be divided, and considered as operating in one sense with respect to the copyhold, and in another with respect to the freehold. If it can, and the case of *Standen* v. *Standen* is rightly decided, I think it applies strictly to this case.

The will does not refer to the power; but the question is whether it does not refer to the estate. It refers to the estate in clear and unequivocal terms; and as the rule is that all the words of a will should, if possible, have effect, and these words with respect to copyholds cannot be satisfied by anything short of considering them an execution of the power, *ut res magis valeat quam pereat*, they should be so construed. That is the general principle of *Standen* v. *Standen*; and we must look only to the general principle, for it is impossible to find two cases precisely alike. The general reasoning in some points of Lord Rosslyn's judgment may have been repudiated: but the principle remains unshaken. The principle is, that where there is nothing for the will to operate upon, but with reference to the power, it must operate as an execution of the power.

For these reasons I am of opinion that the will is an execution of the power as to the copyholds.[1]

WALKER *v.* MACKIE.

Chancery. 1827.

[*Reported* 4 *Russ.* 76.]

The testatrix in this case had power to appoint by will a certain leasehold estate, and certain sums of 3 per cent. stock, which were standing in the name of the Accountant-General of the Court of Chancery. She was entitled to both for her life; and the stock had been transferred to the accountant-general upon a bill filed by her.

The testatrix began her will by giving certain pecuniary legacies, and then gave "all the rest and residue of her bank stock to her goddaughter, Mary Ann Wood, with her wearing apparel, goods, and chattels of every kind whatsoever, and all other property she possessed

[1] *Napier* v. *Napier*, 1 Sim. 28 (1826), *accord*.

at the time of her decease, excepting £50 of her bank stock, which she gave thereout to her executors." It was proved, that she had no bank stock, nor any stock whatsoever, except the stock in court, over which she had a power of appointment.

The question was, whether the will was a good execution of the power, so as to pass the stock.

Mr. Sugden and *Mr. Phillimore*, for the plaintiff.

Mr. Beames, for the defendant.

The Master of the Rolls [Sir John Leach] was of opinion that the will was a good execution of the testatrix's power as to the 3 per cent. stock in court; that her pecuniary legacies were payable out of it; and that the will was also a good execution of her power as to the leasehold estate; it being plain that she meant to describe the property, over which her power extended, under the words — "all other property which she possessed," — by excepting out of it £50 of her bank stock, which she gave to her executors.[1]

[1] "This case involves three points, and none of them presenting any difficulty: 1, the gift of the stock was specific — *my* bank stock; 2, although the gift of the pecuniary legacies was general, and standing by itself would not have operated as a charge of the property under the power, yet being followed by a gift of the *residue* of her bank stock, the legacies themselves were of course part of the same subject; 3, the gift of the residue of the property was held to include the leasehold on account of the exception out of the general gift of £50 of her bank stock, which proved that she was dealing with the subject of the power. It would have been a strained construction to refer the exception of the £50 to the corpus of the bank stock itself, and so have left the remainder of the gift naked and unexplained, in which case it would not have operated under the power.

"But it has been since said that *Walker* v. *Mackie* does not appear to be reconcileable with other cases, particularly that of *Webb* v. *Honnor*, 3 Myl. & Kee. 697. But *Webb* v. *Honnor*, it is submitted, is not an authority against *Walker* v. *Mackie*, nor is it entitled to more weight than the latter case, and the writer is not aware of any other case not reconcileable with *Walker and Mackie*. The observation alluded to was made in the case of *Hughes* v. *Turner*, in which Sir John Leach at the Rolls followed the doctrine in *Walker* v. *Mackie*, *Hughes* v. *Turner*, 3 Myl. & Kee. 666; but when upon the rehearing in *Hughes* v. *Turner*, it was decided that the testatrix was seised in fee of estates in the counties she mentioned in her will, the main prop of his argument was removed, and it would have been difficult to hold that the mere gift of two or three trifling articles which were in effect comprised in the power, the testatrix's possession of which was not accounted for without reference to the power, could give to a general residuary gift and devise the operation of an execution of the power." — *Sugd. Pow.* (8th ed.) 321.

GRANT *v.* LYNAM.

CHANCERY. 1828.

[*Reported* 4 *Russ.* 292.]

THE testator, John Veal, made his will, *inter alia*, in the following words: — "I give and bequeath my present dwelling-house, garden, premises, and land adjoining, now in the occupation of Mr. Charles Baker, to Elizabeth, my dearly beloved wife, for her use and benefit during her life, and with a power of giving and disposing of the said house and premises after her decease, with the limitation and condition of her bequeathing the same to any one of my own family she may think proper. *Item*, I give and bequeath to my said wife all my household furniture, plate, linen, books, and other utensils; and, after her decease, to any one or more of my own family she may wish or direct."

Elizabeth Veal, the testator's wife, survived him, and by her will "gave and bequeathed all her leasehold property, her moneys and securities for money, goods, furniture, chattels, personal estate and effects whatsoever, subject to the payment of her just debts, funeral and testamentary expenses and legacies, to trustees upon trust to convert the same into money, and to stand possessed of the same, for the only use and benefit of John Grant, when he should attain twenty-one; and if he should die before twenty-one, then to the only use and benefit of the brothers and sisters of the said John Grant who should be living at the time of his decease, with benefit of survivorship between them."

It was proved in the cause, that the testatrix, at the making of her will and her death, had no other leasehold property than the dwelling-house bequeathed to her by her husband. John Grant, the legatee, was nearly related to the testator John Veal, but was one degree more remote than his next of kin.

It was not contended that John Grant could claim any part of the personal chattels of the testator John Veal, which might be in the possession of his widow at her death, under the general description of "her moneys, &c.;" but it was insisted, that, inasmuch as the testatrix had no other leasehold estate than the dwelling-house specifically described in the testator's will, the bequest of all her leasehold property amounted to evidence of her intention to exercise her power in that respect; and further, that John Grant, being one of the testator's family, was capable of taking, although not one of his next of kin.

Mr. Treslove and *Mr. Hayter*, for the plaintiff.

Mr. Skirrow, contra.

THE MASTER OF THE ROLLS. [SIR JOHN LEACH.] It is well settled, that, if the donee of a power has no freehold estate, except that which is the subject of the power, the will of the donee, giving freehold

estate, will be so far deemed an execution of the power; for otherwise the will, as to that property, would wholly fail. There is no distinction between freeholds and leaseholds in the nature of the subjects; the difference is only in the quantity of interest: and there does not appear to me to be any solid ground, upon which it is to be maintained that a gift of leasehold, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power, as a gift of freehold under the same circumstances. A general gift of moneys, securities for moneys, and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles; and as to them, the will must refer to them as the subjects of the power, or they will not pass.[1]

[The Master of the Rolls then considered the question whether the gift to John Grant was good, and determined that it was.]

DENN d. NOWELL *v.* ROAKE.

House of Lords. 1830.

[*Reported* 6 *Bing.* 475.]

This cause having been removed by a writ of error from the Court of Common Pleas to the Court of King's Bench, and thence to the House of Lords, the opinion of all the judges was now delivered by

Alexander, C. B. My Lords, — there is no difference of opinion among the judges in this cause.

The question which they have had to consider in pursuance of your Lordships' order, is expressed in these words: —

Whether, upon the facts stated in the special verdict in this case, the will of Sarah Trymmer operated as an execution of the power of appointment of that moiety of the tenements in Surrey, of which she was tenant for life, with the power of appointment stated in the special verdict.

The facts stated in the special verdict, which it is material to recollect, are these: — In the year 1749, estates, one moiety of which is now in question, upon the death of their father, Miles Poole, descended upon Sarah the wife of Thomas Scott, and Elizabeth the wife of Henry Roake, who were his daughters and co-heirs, validly settled to the following uses: one full undivided moiety to the use of Thomas Scott for life; the remainder to the use of Sarah Scott his wife for life; remainder to the use of such person or persons, and for such estate and estates, as the said Sarah Scott, whether covert or sole, should by any deed or writing under her hand and seal, to be sealed and executed in the presence of three or more credible witnesses, with or without power

[1] But cf. *Webb* v. *Honnor*, 1 Jac. & W. 352 (1820).

of revocation, or by her last will and testament in writing, or any writing purporting to be her last will and testament, to be by her subscribed and published in the presence of three or more credible witnesses, from time to time limit, direct, or appoint; and for want of appointment, to the use of the children of that marriage; and in default of issue, this moiety was limited to Elizabeth Roake for her life, with limitations to her family analogous to those which I have mentioned respecting Sarah Scott and her family.

The other undivided moiety was limited for the use of Elizabeth Roake for life, subject to limitations exactly of the same nature and description with those I have already mentioned as to the preceding moiety. It is unnecessary to detail them. Sarah Scott survived her first husband, Thomas Scott, and afterwards intermarried with one John Trymmer, whom she also survived.

She became a widow the second time in 1766. In 1775 she purchased the other undivided moiety from the family of Roake. By deeds dated in that year, that moiety was conveyed to make a tenant to *præcipe*, in order to the suffering of a common recovery, which recovery it was declared should inure to the use of Henry Roake for life, with remainder to Sarah Trymmer, the widow, in fee. Henry Roake died in 1777, and by his death Sarah Trymmer came into the possession of that undivided moiety. From this time, therefore, to the time of her death, she had the absolute and entire interest in that undivided moiety of the estate which had been originally by the deeds of 1750 limited to the family of Roake; and as to her own moiety, her first husband, Thomas Scott, being dead, she was tenant for life of it, with power of appointment or authority before particularly stated, and in default of appointment the estates stood limited to the several uses I have also before stated.

Such were the rights, interests, and authorities which were vested in Sarah Trymmer when she made the will to which the question put by your Lordships refers.

That will is dated on the 6th of June 1783, has all the solemnities required by the deed of 1750, creating the power, and is, so far as respects this subject, in the following words: — "I hereby give and devise all my freehold estates in the city of London and county of Surrey, or elsewhere, to my nephew John Roake, for his life, on condition that out of the rents thereof, he do from time to time keep such estates in proper and tenantable repair; and on the decease of my said nephew John Roake, I devise all my estates, subject to and chargeable with the payment of £30 a year to Ann, the wife of the said John Roake, for her life, by even quarterly payments to and among his children lawfully begotten, equally, at the age of twenty-one, and their heirs as tenants in common; but if only one child should live to attain such age, to him or her, or his or her heirs, at his or her age of twenty-one. And in case my said nephew John Roake, should die without issue, or such lawful issue should die before twenty-one, then I devise all the said

estates, chargeable with such annuity of £30 a year to the said Ann Roake for her life in manner aforesaid, to and among my nephews and nieces Miles, Thomas, John, James, and Sarah Pinfold, and Susannah Longman, or such of them as shall be then living, and their heirs and assigns forever."

My Lords, we are of opinion that this devise is not an execution of the authority given to Sarah Trymmer by the settlement of 1750. There are many cases upon this subject, and there is hardly any subject upon which the principles appear to have been stated with more uniformity, or acted upon with more constancy. They begin with *Sir Edward Clere's case* in the reign of Queen Elizabeth, to be found in the Sixth Report, and are continued down to the present time; and I may venture to say, that in no instance has a power or authority been considered as executed unless by some reference to the power or authority, or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual — would have had nothing to operate upon, except it were considered as an execution of such power or authority.

In this case there is no reference to the power, there is no reference to the subject of the power, and there is sufficient estate to answer the devise without calling in the aid of the undivided moiety now in question. All the words are satisfied by the undivided moiety of which she was the owner in fee.

It is said that the present is a question of intention, and so perhaps it is. But there are many cases of intention, where the rules by which the intention is to be ascertained are fixed and settled.

It would be extremely dangerous to depart from these rules, in favor of loose speculation respecting intention in the particular case.

It is, therefore, that the wisest judges have thought proper to adhere to the rules I have mentioned, in opposition to what they evidently thought the probable intention in the particular case before them.

I will refer to one only, to *Jones* v. *Tucker*, 2 Mer. 533, before Sir William Grant. In that case a person had power to appoint £100 by her will; she bequeathed £100 to the plaintiff, and, it is said, had nothing but a few articles of furniture of her own to answer the bequest.

The language, which, according to the reporter, Sir W. Grant used was this, "In my own private opinion, I think the intention was to give the £100 which the testatrix had a power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

The only circumstance that has been pointed out as furnishing evidence of the testatrix's intending to execute the power in question, is the condition annexed to the devise to John Roake the devisee for life, viz., *that he should, out of the rents and profits of the devised premises, keep them in tenantable repair.*

I say this is the only circumstance, because it has been fixed by many cases, that using the words "my estates," although the sub-

ject of the power might have been at one period the property of the person to exercise it, will not be considered as an execution of the power.

We are of opinion that the direction respecting the repairs has no effect in proving, according to the authorities, that this testatrix meant to execute her authority over the undivided moiety of this estate.

It appears to us that this would be to contradict that long list of decisions to which I have referred, and would be to indulge an uncertain speculation in opposition to positive rules.

There is no incongruity in directing a tenant for life of an undivided moiety to keep his share of the premises in repair. A person with such an interest is not without remedies for enforcing repairs, and at the worst the devise would make him liable as against the remainderman for dilapidation.

It seems, therefore, to my brothers as well as to myself, that the question which your Lordships have been pleased to put to us should be answered in the negative, and that the will of Sarah Trymmer did not operate as an execution of her power.

Judgment of the Court of King's Bench affirmed.[1]

POMFRET *v.* PERRING.

CHANCERY. 1854.

[*Reported* 5 *De G. M. & G.* 775.]

THIS was an appeal from a part of a decree of the *Master of the Rolls*, deciding that a testamentary appointment affected funds already appointed, subject to a power of revocation and new appointment. The case is reported in the 18th volume of Mr. Beavan's Reports, page 618. The following statement will be found sufficient to explain the point decided upon the appeal.

By a settlement, dated the 30th of April, 1799, and made on the marriage of Philip Perring and Sarah Jackson, two sums of £2000 and £3000 stock were settled in trust, after the death of the survivor of the intended husband and wife, for all and every or such one or more of the children of the marriage, as the intended husband should by deed or will appoint, and in default of such appointment, as the intended wife, if she should be the survivor, should by deed or will appoint; and in default of appointment for the benefit of the children of the marriage,

[1] In the Common Pleas the defendant had judgment, *Doe* d. *Nowell* v. *Roake*, 2 Bing. 497 (1825); but this was reversed in the King's Bench on writ of error, *Denn* d. *Nowell* v. *Roake*, 5 B. & C. 720 (1826). The case in the House of Lords, where the judgment of the King's Bench was affirmed in accordance with the opinion of the judges, is reported fully, *sub. nom. Roake* v. *Denn*, in 4 Bligh N. S. 1. — ED.

Contra, *Funk* v. *Eggleston*, 92 Ill. 515 (1879)

as therein mentioned. The settlement contained a covenant that as soon as a sum of £1500, secured by a covenant of the intended wife's father, should be laid out in land, such land should be relimited to uses conferring a life-estate in the intended husband, with remainder to the intended wife for life, with remainder to the children, as the husband should appoint, and, in default of such appointment, as the wife, if she should survive, should appoint. There were also covenants by the father of the intended wife, and by the husband, for payment of £700 and £5000 respectively after their respective deceases, and declarations of trust subjecting those sums to a power of appointment in the wife if she survived the husband, similar to the power with respect to the £2000 and £3000.

By his will, dated 13th of November, 1835, Thomas Jackson (the father of Mrs. Perring), after giving certain legacies, devised and bequeathed all his real and the residue of his personal estate to trustees, in trust to sell and convert, and invest the produce in the public stocks or funds or government or real securities, and pay the dividends and interest thereof, and the income of his real and personal estate till converted, to his daughter Mrs. Perring for life, for her separate use, without power of anticipation; and after her decease to divide the capital among such of her children, and the issue of any child or children, in such shares, and subject to such limitations over, and with or without power of revocation, as she should by deed or will appoint, and in default of appointment, and as to so much of the trust funds, and of the beneficial interest therein, whereof no such appointment should be made, in trust for all the children of Mrs. Perring, share and share alike.

Mr. Perring died without executing the power, and afterwards, on the 15th of November, 1847, Mrs. Perring executed a deed-poll, whereby, after reciting the will of her father, and the marriage of her youngest child Blanche with Edward Butler, and that no settlement had been executed on the marriage, she appointed one-fifth part of the residuary property under the will of her father, over which his will gave her a power of appointment, to Mrs. Butler for life, for her separate use without power of anticipation, and after her decease for the benefit of her children as therein mentioned; and if there should be no issue of Mrs. Butler living at Mrs. Butler's decease, then she appointed the said fifth part in trust for the children of her son Jackson Perring deceased, and her other three then surviving children. The deed also contained a proviso that in case Mrs. Perring should not thereafter direct to the contrary, Mrs. Butler or her issue should not be entitled to any further share of the residuary property, under Mr. Jackson's will; Mrs. Perring thereby declaring her intention to be that the other four-fifths, over which she had not exercised her power of appointment, should after her decease devolve equally upon her children Charles Perring, Claude Perring, and Ellen Goodchild, or their respective representatives, and the personal representative of Jackson Per-

ring, such last-mentioned representative taking the share only which the said Jackson Perring would have taken had he been living. And Mrs. Perring thereby reserved to herself a power of revoking, by deed or will, the appointment of the one-fifth thereby made, and to make any other direction or appointment or disposition of the same.

By a deed of the 8th of May, 1852, it was declared that the lands, to be purchased with the £1500, mentioned in the settlement of 1799 should be conveyed to the uses declared by that settlement, or such of them as were then subsisting.

In 1849 Claude Perring died without having been married.

Mrs. Perring made her will, dated the 10th of May, 1852, as follows: —

"I give, devise, and bequeath, and by virtue of every power or authority whatsoever by an indenture bearing date on or about the 30th day of April, 1799," &c., "and by an indenture dated the 8th day of this present month, or either of such indentures, given or limited to me, or otherwise howsoever enabling me, do by this my will direct, limit, and appoint all and singular the stock, sums of money, messuages, hereditaments, and real and personal estate whatsoever, which I may at my decease be possessed of or entitled to, or, under or by virtue of the powers contained in the said indenture of settlement or otherwise, have power to appoint, save and except the sum of £20, part of the sum of £5000, in the said indenture of settlement covenanted to be paid (which I expressly allow to devolve unappointed by me), in manner following (that is to say), two equal fourth parts of the same respectively to Charles Perring, one-fourth to my daughter Ellen Goodchild, and the remaining one-fourth to my daughter Blanche Butler, for her separate use," &c.

Mrs. Perring died on the 9th of February, 1853.

The Master of the Rolls made a decree, declaring that the will of Mrs. Perring operated as an exercise of the power of appointment reserved to her by her father's will, as well as of the power reserved by the settlement and the deed of the 8th of May, 1852, and that the appointment made by the deed-poll of the 15th of November, 1847, was revoked by Mrs. Perring's will, and that the whole of Thomas Jackson's residuary estate passed by Mrs. Perring's will, except the sum of £20 therein mentioned.

Mr. and Mrs. Butler appealed from the two latter declarations.

Mr. R. Palmer and *Mr. Jolliffe*, in support of the appeal.

Mr. Roupell and *Mr. Druce*, for the respondents.

Mr. Southgate, for other parties.

The Lord Justice Knight Bruce. I apprehend that it is not according to the true import or correct interpretation of the words used by the testatrix to say that they exhibit of themselves an intention to exercise a power of revocation. But if the will shows an intention to have existed, which, without so construing them, cannot be effectuated, they may certainly be so construed. I conceive, however, that the

will here does not show such an intention. Every word of the instrument may, in my opinion, be satisfied, without ascribing to the testatrix any idea of dealing with the power of revocation or the property subjected to it.

The Lord Justice Turner. The cases cited on behalf of the respondents are very distinguishable from the present. Here an actual appointment has been made with a power of revocation, and that appointment was to be undone, before the power of new appointment would arise. To show that a power of this description has been exercised, it is not, I think, enough to show an intention to appoint; an intention to revoke the former appointment ought, I think, also to be shown. The principles acted on in other cases, with respect to the exercise of powers, seem to me to apply to this. If a person has an interest in one subject, and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest, but only a power. The same principle must, I think, apply to a case where a person has a power of appointment, and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would be then held to be an exercise of that power, I think it clear that an intention must be shown to revoke and undo what has been already done. I cannot find that intention here.

I concur with my learned brother in thinking that the appeal on this point must be allowed.

Declare that the power of revocation was not exercised by the will of Sarah Perring, and vary decree accordingly. Costs out of estate.

GOODS OF MERRITT.

Court of Probate. 1858.

[*Reported* 1 *Sw. & Tr.* 112.]

E. Harding, by her will, bequeathed £650, 3 per cent consols, to trustees upon trust to pay the dividends thereof to her daughter, Elizabeth Merritt (the deceased in this case), during her life for her separate use, and after her decease she directed the same to remain upon such trusts as the said E. Merritt should by her last will appoint; and, in default of appointment, she directed the trustees to apply the stock and dividends in such manner and such proportions as they might consider most for the benefit of any child or children of the said Elizabeth Merritt, as might be living at the time of her death.

In August, 1846, the deceased made and executed a will, and thereby, after referring to the power given to her by her mother's will, she directed that the trustees should after her death, in case her husband survived her, pay the dividends of the said stock to him for the term of his natural life, and that after his death, they should stand possessed of the said stock in such manner as directed by her mother's will; she appointed executors of this will, which disposed of no other property, than as above mentioned.

Besides this property under her mother's will. the deceased had a separate life income under the will of her brother, but no power to deal with that by will; and under her marriage settlement she had power to dispose of £1400 consols thereby settled by will amongst her children; and also, with the consent in writing of the trustees of her marriage settlement, to revoke by deed the trusts of such settlement, and appoint new ones.

On the 13th of February, 1855, her husband being then in Australia, the deceased made a will in the following terms: —

"This is the last will and testament of me, Elizabeth Merritt.

"I give and bequeath unto my eldest son, William Harding Merritt, all my plate and plated articles, and I appoint Thos. Newton my sole executor of this my will, for the purposes herein mentioned. And I direct my executor to pay all my just debts, notes of hand, bonds, or any and every other security for any moneys which I may have received out of my own settlement of £1400, which was taken out of the Basingstoke Bank by Charles Bailey, Esq., solicitor. And I hereby revoke any settlement of such £1400 I may have heretofore made; and it is also my will and desire that the sum of £105, out of the aforesaid settlement of £1400, be paid to the trustees or directors of St. Anne's School at Brixton, in the county of Surrey, for the education of my youngest son, Walter Merritt, as soon as his age will admit of his being therein received after my decease; and further, that the sum of £6 per annum be paid unto Patience Merritt, during the term of her natural life, out of the interest arising from the residue of the £1400; and that at my decease the remainder of principal and interest be paid unto my husband, W. Merritt, in case he shall survive me, if otherwise, such moneys to be then divided, share and share alike, among and between my surviving children. All my household furniture, trinkets, ornaments, and wearing apparel, I give and bequeath unto and for the use of my dear family of children; and I revoke all former wills by me at any time heretofore made. In witness whereof I have to this my last will and testament, contained in this sheet of paper, set my hand and seal, this 13th day of February, 1855. Elizabeth Merritt."

This will was written on one of the printed forms of wills bought at stationers' shops, and there was no authority from her husband to authorize her to make such will.

The deceased died in February, 1855, leaving her husband and the said William Harding Merritt and six other children her surviving

Shortly after, the trustees of her marriage settlement, with which the will of 1855 purported to deal, filed a bill in Chancery against T. Newton, the executor, and W. Merritt and his children, for an administration of the funds of that settlement, and the Master of the Rolls decided, that that will did not affect the trusts of the settlement, and decreed the trusts to be specifically performed, and that the trust fund then in court was distributable as in default of appointment.

On the 15th of February, 1856, a special grant of administration was made by the Prerogative Court of Canterbury to the said W. Merritt, of the goods, etc., of the deceased, except any property which by the will of her said mother, or by her marriage settlement, she (the deceased) had power to dispose of, and had disposed of by the above-mentioned wills: the suit in Chancery as to the operation of the second will on the trusts of the marriage settlement being then pending. The trustees of the £650 stock had paid that sum into the Court of Chancery under the Trustee Relief Act. The executors named in the deceased's will of 1846, renounced probate thereof, and the present application was made by W. Merritt, the husband, for a further grant of letters of administration (with the will of 1846 annexed). It came before the court on the 11th of March, on an *ex parte* motion. The court, on hearing the statement of facts, desired the point to be argued, whether the general revocatory clause of the will of 1855 operated as a revocation of the execution of the power by the will of 1846. An appearance was subsequently given on behalf of Wm. H. Merritt, the son of the deceased, who with her other children took an interest, in default of appointment, in the £650 3 per cent consols.

Dr. Addams, Q. C., on behalf of William Merritt.

Dr. Deane, Q. C., *contra*.

Sir C. Cresswell. I have looked at the Statute in consequence of Dr. Deane's ingenious argument, that, inasmuch as since the Wills Act a bequest in general terms will operate upon property over which there is a general power of appointment, so a revocation in general terms will operate to revoke a will made in execution of a general power, although it contains no reference to that will. I cannot agree to this; there are two sets of clauses in the Wills Act: the first, dealing with modes of revocation of testamentary papers: the second, with modes of disposition of property. The first set do not affect this case, which therefore follows the old rule, and the will of 1846, in execution of the power over the £650 stock, remains unrevoked.

I decree letters of administration, with will annexed, as prayed.[1]

[1] Sir C. Cresswell, during the argument, said: "There are some authorities in Williams on Executors in point. If I mistake not, they go to this; — that a general clause, revoking all former wills, was not sufficient to manifest an intention to revoke a will made in execution of a power. The onus of showing that such was the intention — *ultra* the words — was on the other side. Are you relieved from that burden by the Wills Act?"

See 1 Wms. Exec. (8th ed.) 179–181.

IN RE TEAPE'S TRUSTS.

CHANCERY. 1873.

[*Reported L. R.* 16 *Eq.* 442.]

PETITION. Hananiah Teape by his will, dated the 25th of March, 1865, gave the sum of £8500 consols to his executors upon trust to pay the income thereof to his son Theodore Teape for his life, and after his death upon trust to pay to any wife with whom his said son Theodore Teape might intermarry, who should survive him, so much of the income of £5000 consols, part of the said sum of £8500 consols, for her life, as the said Theodore Teape should by any deed or by his last will and testament legally executed direct or appoint, and subject to such appointment (if any), or in case no such appointment should be made, the testator declared trusts of the said sum of £8500 consols in favor of the children and issue of the said Theodore Teape, as in the said will mentioned.

The testator died on the 7th of July, 1868.

Theodore Teape made his will, dated the 14th of November, 1871, which, so far as material, was as follows: —

"I will, order, and direct that as soon as possible after my decease my just debts and funeral expenses be first fully paid. After the payment of my just debts and funeral expenses I give, devise, and bequeath the rest, residue, and remainder of my real and personal, movable and immovable properties and estate, of what kind, nature, and description soever the same may be composed, to whatsoever the same may amount, and wheresoever situate, lying, and being, the same may be found to me belonging at the time of my decease, or to which I may be in anywise entitled, or over which I may have any power of disposition or control, unto my wife Mary Monaghan and to her heirs, assigns, and legal representatives in full property forever, to have and to hold the same and every part thereof unto my said wife the said Mary Monaghan and to her heirs, assigns, and legal representatives, from the day of my decease thenceforth forever in full property, and the same to be by her or them received, recovered, used, enjoyed, and disposed of as she or they may deem best, I, the said testator, hereby making my said wife my sole and universal devisee and legatee."

No power of appointment other than the power conferred upon him by the will of the said Hananiah Teape was vested in the said Theodore Teape at the time of his death.

On the 31st of January, 1873, Theodore Teape died.

The fund having been paid into court, the present petition was presented by the widow of Theodore Teape, who prayed that she might be declared entitled as from the death of her late husband, and during her life, to the income of the said sum of £5000 consols.

The question, was, whether the residuary bequest in the testator's will was a valid exercise of the power of appointment.

The petition was opposed by the persons entitled in default of appointment.

Mr. Waller, for the petitioner.

Mr. Southgate, Q. C., and *Mr. Field*, for the respondents.

Mr. Chamier, for the trustees.

Lord Selborne, L. C. I think the petitioner is entitled to the income of the fund.

In this case the direction in the will for payment of the testator's debts and funeral expenses is separate from the rest of the will, and imports an intention that the debts and funeral expenses should be first paid out of the testator's own property before anything else is done. The question is, whether there is sufficient evidence of an intention to exercise the power. There is nothing on which the words "over which I may have any power of disposition or control" can operate, except the life interest in this sum of £5000 consols; and the court cannot reject these words, when the widow, the object of the power, is the person intended to take. The testator first makes use of the words, "the rest, residue, and remainder of my real and personal, movable and immovable properties and estate," which were large enough to include everything that was his own; and he adds, "or over which I may have any power of disposition or control" — words applicable to any power of appointment he might possess, but which I am asked not to apply to the only power he actually had.

The only difficulty is, that the testator's only power was to appoint a life interest; whereas the words he used, "To my wife, her heirs and assigns and legal representatives, in full property forever," seem at first sight applicable only to the entire interest. But, after all, the reasonable view to take of the words is, that he meant to give his wife the largest interest he could give in everything he had to dispose of; and, if that was a terminable interest, she will take it to the full extent of his disposing power, which, in this case, was for her own life.

I think all the authorities are consistent with this view of the case except *Clogstoun* v. *Walcott*, 13 Sim. 523. But I do not think that case can be reconciled with *Elliott* v. *Elliott*, 15 Ibid. 321, or with *Cowx* v. *Foster*, 1 J. & H. 30, to say nothing of *Ferrier* v. *Jay*, Law Rep. 10 Eq. 550; so that case creates no difficulty. There is still less difficulty from the case of *Hope* v. *Hope*, 5 Giff. 13, 24, for, though there were some words in the judgment which went beyond what was needed for the decision of that case, yet there were sufficient grounds for the decision there arrived at, without affecting the principle on which the present case is to be decided.

I therefore hold that the petitioner is entitled to the income of the £5000 consols during her life.[1]

[1] See *Thornton* v. *Thornton*, L. R. 20 Eq. 599 (1875). But cf. *Ames* v. *Cadogan*, 12 Ch. D. 868 (1879).

BLAGGE *v.* MILES.

CIRCUIT COURT OF THE UNITED STATES, MASSACHUSETTS DISTRICT. 1841.

[*Reported* 1 *Story*, 426.]

THIS was a writ of entry, in which the demandant claimed the demanded premises as grandson and heir of Sarah Blagge. The tenant claimed under the last will and testament of Sarah Blagge. The case came before the court upon an agreed statement of facts, and was argued by *George M. Mason*, for the demandant, and by *Rufus Choate* and *George S. Hillard*, for the tenant.

The facts in the case, as stated in the opinion of the court, were as follows: —

Mrs. Hall, by a codicil to her will, duly executed, after revoking the devise of real estate in her will, devised as follows: "Item, to Elizabeth Jarvis aforesaid (the daughter of the testatrix) I give, bequeath, and devise one undivided fifth part of all my said real estate, in trust, nevertheless, for the entire use and benefit of my daughter Sally Blagge, for and during her natural life; the said fifth part to be subject to the absolute disposal of the said Sally by her last will and testament, and the income, rents, and profits thereof to be paid over and applied to her use annually; and if the said Sally Blagge shall die without having disposed of the same, then I give and devise the remainder and reversion thereof to her heirs forever." The will and codicil, after the death of the testatrix, were duly proved and approved by the Court of Probate, in 1822. In January, 1836, Mrs. Blagge procured, on her petition, a Resolve to be passed, by the legislature of Massachusetts, whereby one Fitz James Price was authorized to sell a part of the real estate in Boston, devised to her by Mrs Hall, and which had been duly set off to Elizabeth Jarvis, in trust for her, upon a division of the estate by the Judge of Probate, he first to give bond with sureties to invest the net proceeds of said sale in other estate, to be held by him upon the like trust, and for the same uses and purposes, as the same estate was then holden. Price accordingly, under this Resolve, sold the land stated in the Resolve for $13,000. With the consent of the guardian of the demandant (who is a grandson and heir to Sarah Blagge) Price afterwards invested a portion of the proceeds of this sale in certain real estate in New London, Connecticut, one parcel of which was first conveyed by the grantor, Ezra Chappell, to Sarah Blagge, and by her afterwards to Price, and the other parcel was conveyed directly to Price by the grantor, George Erving; both conveyances were upon the very same trusts stated in the will of Mrs. Hall.

Afterwards, in 1839, Sarah Blagge died, having first made her will in the same year, which was duly executed, proved, and approved; and by that will, after certain specific and pecuniary legacies, she made the

following devises: "To my daughter, Eliza J. Caldwell, I give and bequeath my house and land in New London, being the same, which I purchased partly of Ezra Chappell, and partly of George Erving, during her natural life; and at her decease, I give and devise said house and land to my two grandsons, Charles H. B. Caldwell and Samuel Blagge Caldwell, and to their heirs forever. All the rest and residue of my estate, of every nature and kind, I give, devise, and bequeath as follows, namely: one third part to my daughter, Sarah Miles, and her heirs forever; one third part to my daughter, Margaret C. Drane, and her heirs forever; one third part to my daughter, Eliza J. Caldwell, and her heirs forever."

In point of fact, the legacies in Mrs. Blagge's will are more than sufficient to exhaust the whole of her personal estate at the time of her death and of her making her will; and she owned no other real estate, except that devised to her by the will of Mrs. Hall, and that purchased with the proceeds of the sale under the resolve above mentioned.

The demandant claims title as an heir of Mrs. Blagge to the demanded premises, which are parcel of the real estate set off to her in the division of Mrs. Hall's estate.

Story, J. This cause has been very ably argued upon both sides. It turns principally upon a question, which rarely occurs in our jurisprudence, the due execution of a power of appointment; and the learning, appropriate to it, has been fully brought before the court in the course of the present discussion. The facts in substance are as follows. [Here the judge recapitulated the facts as before stated, and then proceeded.]

The main question, therefore, is, whether, under the circumstances, Mrs. Blagge, by the devise in her will, has duly executed the power, given her by the will of Mrs. Hall. If she has, then the demandant has no title whatsoever; if she has not, then he is entitled to recover in the suit.

Some other questions have, however, been raised at the argument, which should be disposed of, before we proceed to that, which constitutes the main hinge of the controversy.

And, first, it is said, that even if Mrs. Blagge's will is a due execution of the power, the demandant is entitled to a share of her estate under the Revised Statutes of Massachusetts, of 1835, *ch.* 62, sect. 21, as a lineal descendant of Mrs. Blagge, who was unprovided for in her lifetime, and was unintentionally and by mistake or accident omitted to be named as a devisee in her will. [The court decided against this contention. This part of the opinion is here omitted.]

Then, as to another objection, which has been urged, that the Resolve is an unconstitutional exercise of power by the legislature, because it is usurping the functions of the judiciary, contrary to the provisions of the Bill of Rights of the Constitution of Massachusetts, which declares, that "the legislative department shall never exercise the executive and judicial powers, or either of them." [The court intimated an opinion that the Resolve was not a judicial act, and added:] But it is the less

necessary to dispose of this question absolutely, and therefore I give no positive opinion upon it; because, if the power has been duly executed by Mrs. Blagge, whether the Resolve be constitutional or not, makes no difference in this case, since the demandant has no title whatsoever to the property under her will; and the constitutionality of the Resolve is not contested by those, who alone are donees under the power.

Having disposed of these points, we may now advance to the main question involved in this controversy. Was the will of Mrs. Blagge a due execution of the power contained in that of Mrs. Hall? And this, after all, I take to depend upon her intention, as expressed in and derived from the language and object of the will of Mrs. Blagge. There was a long struggle in Westminster Hall upon the point, whether in wills, the intention of the testator, as gathered *ex visceribus testamenti*, was to be followed in the interpretation of devises, or whether the technical construction of law, given to certain phrases, was to prevail over the intention. That struggle, at least, since the decision in *Perrin* v. *Blake* (4 Burr. R. 2579; Fearne on Conting. Rem. by Butler, 9th edit. p. 156), seems to have terminated. It is now admitted to be established, as the general rule, that the intention of the testator is the pole-star to direct the court in the interpretation of wills, and that technical words and set phrases are controlled by, and do not control, that intention, when clearly expressed or positively ascertained. The consequence is, that decisions upon particular wills are of far less consequence now, than they formerly were supposed to be; unless, indeed, where the leading provisions are almost identical, and the facts substantially alike. They now furnish, not so much authorities, as analogies, by which to interpret the words of wills in new cases.

I apprehend, that similar doctrines now generally prevail in regard to the execution of powers, and especially in regard to their execution by last wills and testaments. The main point is, to arrive at the intention and object of the donee of the power in the instrument of execution; and, that being once ascertained, effect is given to it accordingly. The authorities upon the subject may not all be easily reconcilable with each other. But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree, that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree, that it is not necessary, that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient, that it shall appear by words, acts, or deeds, demonstrating the intention. This was directly asserted, not only in *Sir Edward Clere's Case*, 6 Co. R. 17, but it was positively

affirmed in *Scrope's Case*, 10 Co. R. 143, 144, where the reason of the rule is stated: *Quia non refert, an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.* On the other hand, to use the language of Lord Chief Justice Best, in *Doe d. Nowell* v. *Roake,* 2 Bing. R. 497, 504. "No terms, however comprehensive, although sufficient to pass every species of property, freehold or copyhold, real or personal, will execute a power, unless they demonstrate, that a testator had the power in his contemplation, and intended by his will to execute it." Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will, or other instrument, to the power; (2) Or a reference to the property, which is the subject, on which it is to be executed; (3) Or, where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power. It seems unnecessary to refer at large to the cases, which establish these propositions. They will be found collected, generally, in Mr. Chance's Treatise on Powers (2 vol. ch. 13, § 1591 to § 1714), and in Sir Edward Sugden's Treatise on Powers (vol. 1, ch. 6, § 2, p. 257, &c.; Id. § 7, p. 373, &c.; Id. § 8, p. 430, &c.), and in the opinion of of the court, delivered by Lord Chief Justice Best, in *Doe d. Nowell* v *Roake*, 8 Bing. 497. Lord Chief Baron Alexander, in delivering the judgment of the judges, in the House of Lords, in *Denn d. Nowell* v. *Roake*, 6 Bing. R. 475, reversing the decision in the same case, in 2 Bing. R. 497, and affirming that of the King's Bench, 5 B. & Cressw. 720, has enumerated the same classes of cases; and he has added, that in no instance has a power or authority been considered as executed, unless under such circumstances. Whether this be so, or not, it is not material to inquire; for there is no pretence to say, that, because no other cases have as yet occurred, there can be no others. That would, in fact, be to say, that the cases governed the general rule as to intention, and not the rule the cases. Lord Chief Justice Best has put these classes of cases upon the true ground. They are instances of the strong and unequivocal proof, required to establish the intention to execute the power; but they are not the only cases. On the contrary, if a case of clear intention should arise, although not falling within the predicament of these classes, it must be held, that the power is well executed, unless courts of justice are at liberty to overturn principles, instead of interpreting acts and intentions. I entirely agree with Lord Chief Justice Best, in his remark in *Roake* v. *Denn*, 4 Bligh N. S. 22, that, "Rules with respect to evidence of intention are bad rules, and I trust I shall live to see them no longer binding on the judges." The Lord Chancellor, Lord Lyndhurst, said, that "It has been settled by a long series of decisions from the case, which has been referred to in the time of Sir Edward Coke, *Sir Edward Clere's Case*, 6 Co. R. 17, down to the present time, that if the will, which is insisted on as an execution of the power, does not refer to the power,

and if the dispositions of the will can be satisfied without their being considered to be an execution of the power, unless there be some other circumstances to show, that it was the intention of the devisor to execute the appointment by the will, under such circumstances the courts have uniformly held, that the will is not to be considered as an execution of the power." Certainly it is not. But then this very statement leaves it open to inquire into the intention under all the circumstances; which seems to me to be the true and sensible rule upon the subject; and when that intention is thus once ascertained, it governs. So, it was expressly held, in *Pomeroy* v. *Partington*, 3 Term R. 665; and in *Griffith* v. *Harrison*, 4 Term R. 737, 748, 749, the court expressly repudiated the notion, that any technical exposition was to be given to the words of a will, executing a power; and held, that the intention was to be collected from the words according to the ordinary and common acceptation thereof. And again, in *Baily* v. *Lloyd*, 5 Russ. R. 330, 341, the court held, that the question of the execution of a power by a will, was a mere question of intention, and that intention was to be collected, not from a particular expression, but from the whole will.

Now, *Sir Edward Clere's Case*, 6 Co. R. 17, is not only unquestionable law, and has so been always held; but it affords a strong illustration of the true doctrine. In that case, it was held, that the power was well executed, notwithstanding it was not referred to, because otherwise the devise in the will would be inoperative and void. The testator had no estate in the property devised, but only a power over it; and so, *ut res magis valeat, quam pereat*, it was held, that he intended to execute the power. Nor is there any objection to the doctrine of Lord Chief Justice Hobart, in the *Commendam Case*, Hob. R. 159, 160, that if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest, and not to the power." This is but saying, in other words, that where the terms of a devise are perfectly satisfied and operative, without any reference to the execution of a power, by working on the interest of the testator in the land, there it shall not be deemed, that he intended to execute the power; but merely to pass his interest. This proceeds upon the plain ground, that there is nothing in the will, which shows any intention to execute the power; and in cases of doubt the court cannot deem it a good execution of the power.

Sir Edward Sugden (Sugden on Powers, vol. 1, ch. 6, § 7, p. 402, 428) has critically examined and commented upon all the leading authorities; and it appears to me, that his criticisms (and he is himself a very high authority upon this subject) are entirely well founded. The courts have, indeed, as he abundantly proves, proceeded in some cases upon very narrow and technical grounds, and in others have adopted a more liberal and just interpretation; and the cases do not all well stand together. The rule of ascertaining the intention, however, has been recognized at all times; and, as Lord Kenyon has well observed, in

Pomeroy v. *Partington*, 3 T. R. 674, 675, if the judges, in construing the particular words of different powers, have appeared to make contradictory decisions at different times, it is not, that they have denied the general rule; but because some of them have erred in the application of the general rule to the particular case before them. In a conflict of authorities, I own, that I should choose to follow those, which appear best founded in the reason and analogies of the law. But, in cases of wills, where the intention is to govern, no authorities ought to control the interpretation, which the court is called upon to make, unless all the circumstances are the same in both cases, and the ground of interpretation in one is entirely satisfactory to the mind, as applied to the other. If I were compelled to decide between the cases of *Wallop* v. *Lord Portsmouth*, Sugden on Powers, ch. 6, § 7, p. 394; *Hurst* v. *Winchelsea*, 2 Vesey, Jr. 589; *Standen* v. *Standen*, Ibid.; *Lewis* v. *Llewellyn*, 2 Lord Kenyon's R. 444, by Hanmer; and the case of *Jones* v. *Curry*, 1 Swanst. R. 66, if there be any dissonance between them, I should much incline to follow the former. But, in my view, all these cases stand upon their own particular circumstances, and neither is exactly like the present.

We must dispose of this case, then, upon principle; for I cannot admit, that it is governed by any positive controlling authority, or that it will trench upon any established doctrine, whichever way it is decided.

But before proceeding to discuss the terms of this devise, as an execution of the power, it is indispensable to dispose of an argument greatly pressed at the bar, and that is, that the New London estates, in no proper sense, fall within the scope of the power, which only applies to the original devised property, and not to these substituted New London estates; first, because the resolve itself does not attach the power to any substituted estates after the sale; and secondly, if it does, still the investment in the New London estates, being out of the State, was not authorized by the Resolve, and, therefore, cannot be deemed an execution of the power, but is an utterly void act. I cannot accede to this interpretation of the terms of the Resolve. The language of it is, that Price, the trustee, is "to invest the net proceeds of said sale in other real estate, to be held by him upon the like trusts, and for the same uses and purposes as the estate above described is now holden." It seems to me impossible to entertain any real doubt, that the substituted estate was to be held upon precisely the same trusts, as the original estate, by the will of Mrs. Hall. The original estate was held expressly in trust for the use of Mrs. Blagge during her natural life, subject to her absolute disposal by her last will and testament, and if she should die without having disposed of the same, then the remainder and reversion to be to her heirs forever. The language, then, of the Resolve, is not only appropriate to fasten upon the substituted estate the like trusts, uses, and purposes as were attached to the original estate; but I am at a loss to understand, what other words could have been more directly expressive for this purpose. The power was attached to

the original estate, and was to be served out of the original trust for the uses and purposes therein stated; and the moment the power was executed, it created a direct trust and use in favor of the appointees. The case of *Wallop* v. *Lord Portsmouth*, 1 Sugden on Powers, ch. 6, § 7, art. 34, p. 394, 6th edit., seems to be strongly in point.

The other part of the argument may have a better foundation in law. It may be true, that the trustee had no right to invest the proceeds of the sale in any real estate out of the Commonwealth of Massachusetts; and yet, if that investment has been adopted by the appointees under the power, and the power has been well executed, third persons have no right to interpose and object to it. It amounts, at most, but to a wrongful conversion of trust property, which, however, may, at the election of the *cestuis que trust*, be followed, and the trusts attached thereto in the hands of the persons, holding the property. Nothing is more common in courts of equity, than for the *cestui que trust*, upon a wrongful conversion of the trust fund to follow it in its new forms, and hold it subject to the original trust.

But it is wholly unimportant, in the present case, whether the investment was rightful or wrongful on the part of the trustee, so far as the present controversy is concerned. It was adopted and sanctioned by Mrs. Blagge, as an investment properly made, and upon the identical trusts created by the will of Mrs. Hall, and authorized in the substituted estate by the Resolve. In making her own will, and therein devising the New London estate, Mrs. Blagge manifestly intended to execute the power reserved to her, (in conformity to the original trusts,) contained in the deeds of these estates to Price. She had no other right or title in or over the same to give effect to her devise; and this devise must, therefore, if at all, take effect solely as an execution of this power over the substituted property, as to this estate; and in this respect, then, the case falls directly within the rule already adverted to. It is a case, where, although the power is not referred to in terms, yet the subject matter is expressly disposed of, and the will is void and inoperative, except as an execution of the power.

The whole question is then narrowed down to the mere consideration, whether Mrs. Blagge intended a mere partial execution of the power, *quoad* the New London estate, or meant a full and entire execution of the whole power over all the property, to which it was attached. She speaks of this estate indeed as her own estate, "my house and land lying in New London;" but this does not change the proper interpretation of the words. The language is precisely that, which would ordinarily be used by the donee of a power, absolutely to dispose of the whole property, although without any interest in the property. Lord Loughborough, in *Standen* v. *Standen*, 2 Ves. Jr. 589, alluded to such a form of disposition, as not producing the slightest difficulty in construing the devise to be an execution of a power; and this is certainly now the received doctrine. But the true bearing of this language in this clause of the will of Mrs. Blagge most strongly applies to illustrate her

meaning in the residuary clause, to which I shall presently allude. She treats the New London estate as her own property; but it was her own in the same sense, and in that only, as the other part of the unsold property, devised to her by the will of Mrs. Hall, that is, her property, as possessing the absolute power to dispose of it by her own will.

Now, immediately after the devise of the New London estate comes the residuary clause. "All the rest and residue of my estate of every nature and kind, I give, devise, and bequeath, as follows: viz. one third part to my daughter, Sarah Miles, and her heirs, forever; one third part to my daughter, Margaret C. Drane, and her heirs, forever; one third part to my daughter, Eliza J. Caldwell, and her heirs and assigns, forever." I do not dwell upon the circumstance, that here the language used, "heirs and assigns," applies peculiarly and emphatically to a devise of real estate; nor do I contrast it with the peculiar language in the numerous pecuniary legacies, named in the preceding part of the will, where the words "heirs and assigns" are wholly omitted. Nor do I rely upon the fact, that the personal estate of Mrs. Blagge, at her death, was insufficient to discharge these legacies; for that circumstance alone would not affect the present question; as, from the nature and fluctuation of personal estate, the amount, which would be assets at the death of the testatrix, must always be somewhat conjectural; and, on that account, has not, like real estate, been supposed to be within the contemplation of the testatrix as a specific bequest.

But what may be relied upon is this, that Mrs. Blagge died possessed of no other real estate than that, which was attached to the power, and disposable by her under the same. Under such circumstances, if instead of the words "the residue of my estate of every name and nature," she had said, "the residue of my estate, real as well as personal," it was admitted at the argument, and, indeed, is conclusively established by the authorities, that the residuary clause would have operated upon the real estate, subject to the power, since in that way, and in that way alone, could it be operative; and, therefore, to effectuate the intent, it must be construed as a due execution of the power. The case of *Standen* v. *Standen*, 2 Ves. Jr. R. 589, which was affirmed in the House of Lords, would be decisive on this point; and, indeed, it is but following out the principle of *Sir Edward Clere's Case*, 6 Co. R. 17.

There is no doubt, that the words "all the residue of my estate of every nature and kind," in Mrs. Blagge's will, are sufficient to pass real estate; and if she had left any interest in real estate, in her own right, that interest would have passed by the devise. This doctrine is clear upon the general principles applied to the interpretation of wills, and is also fully borne out by the authorities. It was admitted in *Jones* v. *Curry*, 1 Swanst. R. 66, 72, 73, and recognized in the very recent case of *Saumares* v. *Saumares*, 4 Mylne & Craig R. 340. Still, however, as the word "estate" is *nomen generalissimum*, it may be satisfied by the mere bequest of personal property, if the testator has no real

estate, upon which it can operate; and, therefore, a residuary clause of this sort is not, *per se*, decisive as an execution of a power, as it may operate without touching real estate in the power of the party, but not in his interest.

But the view, which I take of the clause, is this, that it may include real estate, if the testator has any; and if the language then may justly admit of this interpretation, then we have a right to look to see, whether the testatrix did not, from other parts of the will, naturally, if not necessarily, mean to apply the residuary clause to real estate. If she did so intend, and it can be clearly seen, from the other provisions in the will, then it is the duty of the court to carry that intention into effect; and if it cannot be, except as an execution of the power, then it amounts to a due execution thereof. Now, it is precisely here, in my judgment, that the whole stress of the case lies. When I see, that Mrs. Blagge has, in the preceding clause of the will, executed the power, specifically, over certain real estate within the scope of the power, calling it "my house and land," and then immediately adding, "all the rest and residue of my estate of every nature and kind," it is plain to me, that she contemplated all the real estate within the scope of the power, as her own estate, and subject to her own absolute disposal, and that she intended to dispose of all of it by her will, by the very words, which she has used. I am not bold enough to fritter away such an intention, coupled with such acts, by resorting to any technical niceties and refinements. They partake too much of subtlety, and artificial distinctions, (and I say it with the utmost deference for other judgments,) to suit a just or even a reasonable administration of private justice. The case of *Walker* v. *Mackie*, 4 Russ. R. 76, was one of far less stringent circumstances; and yet the then Master of the Rolls, Sir John Leach, held the will a good execution of the power. In that case, the testatrix had power to appoint, by will, a certain leasehold estate, and certain 3 per cent stock, standing in the name of the Accountant-General in Chancery, she being entitled to both during her life. By her will, after certain pecuniary legacies, she gave "All the rest and residue of her bank stock to her daughter A., with her wearing apparel, goods, and chattels of every kind whatsoever, and all other property she possessed at the time of her decease, excepting £50 of her bank stock, which she gave thereout to her executors." It was proved, that she had no bank stock, nor any stock whatsoever, except the stock in court. The Master of the Rolls held, that the will was a due execution of the 3 per cent stock, and also of the leasehold estate. I am aware, that in a later case, *Hughes* v. *Turner*, 3 Mylne & Keen, 666, 697, his successor, Sir C. C. Pepys, disapproved of that decision. But I confess, that I am not prepared to join in this disapproval; and it be not reconcilable with *Webb* v. *Honnor*, 1 Jac. & Walk. 352, or rather with a *dictum* of Sir Thomas Plumer in that case, I am not at all disposed to surrender to the authority of the latter. Be this as it may, the present case differs from all these three cases in its circumstances, and, therefore, is not

governed by the authority of either of them, whatever may be their weight.

The judgment of Sir Thomas Plumer, M. R., in *Jones* v. *Curry*, 1 Swanst. R. 66, has been greatly relied on, at the argument, as directly in point against the present case being a due execution of the power. I have already had occasion to suggest, that it is not so in point; but is fairly distinguishable in its circumstances. The language there was not the same, nor the power the same, nor the facts the same. There seems to me to be great force in the criticism of Sir Edward Sugden on that case. If the words were not sufficient to pass real estate, (which they clearly were,) the point did not arise. If they were sufficient, the case does not appear to have been well decided; for if they were sufficient to pass real estate, and the testatrix had none but under the power, then it might plainly be presumed, that she intended to pass real estate by her will; and if so, it could only be by an execution of the power. Besides, Sir Thomas Plumer, in that case, strongly relied upon the fact, that there was no language in the will of the testatrix, which showed any intention to execute the power, even in relation to the personalty. There was no clear case of an intended part execution of the power. Here, the contrary is established; and the testatrix has executed her power as to the New London estate. And I cannot but consider the language of Sir William Grant, in *Bennett* v. *Aburrow*, 8 Ves. 609, 616, to contain the true doctrine; and it is strictly applicable to the present case. "This, (said that great judge,) is always a question of intention, whether the party meant to execute the power, or not. Formerly it was sometimes required, that there should be an express reference to the power. But that is not necessary now. The intention may be collected from other circumstances; as, that the will includes something the party had not otherwise, than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power."

Upon the whole, my opinion is, that the will of Mrs. Blagge was a complete execution of the power, as to the premises in question; and, therefore, that judgment ought to be entered for the tenant.[1]

AMORY *v.* MEREDITH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported* 7 *Allen*, 397.]

HOAR, J. The testatrix, Miss Elizabeth Amory, being in feeble health, conveyed all her real and personal estate to trustees, upon the

[1] And see *White* v. *Hicks*, 33 N. Y. 383 (1865); *Funk* v. *Eggleston*, 92 Ill. 515 (1879); *Munson* v. *Berdan*, 35 N. J. Eq. 376 (1882); *Warner* v. *Conn. Life Ins. Co.*, 109 U. S. 357 (1883); *Lee* v. *Simpson*, 134 U. S. 572 (1889).

trust to manage the property and pay the income of it to her during her life; to reconvey the whole to her whenever she and the trustees should think it expedient to terminate the trust; or, upon her decease before its termination, to convey it to such persons as she should by her last will designate; or, upon her death intestate, to her heirs at law. She afterward inherited a small amount of real and personal estate which was not included in the trust, and the trust was not terminated during her life. By her last will she gave and devised one half of all the estate, real, personal and mixed, of which she should die seised or possessed, to trustees, for the benefit of the family of a brother; one tenth in trust for a sister and her children; and the residue of her said estate to four brothers and sisters named in the will. This suit is brought by her executors and trustees to obtain the direction of the court in the execution of their trusts, on account of the conflicting claims of the heirs at law and the devisees under the will. And the question is, whether the real and personal estate embraced in the deed of trust will pass under the will?

The answer to this question is to be sought by ascertaining the intent of the testatrix as manifested by the will; and this intention being once ascertained, effect is to be given to it accordingly.

We are therefore to decide whether the language of Miss Amory's will, construed in reference to all the property in which she had a legal or equitable interest at the time it was made, and at the time of her death, shall be held to include in its disposition the property of which she had a power of appointment.

Without reviewing in detail the numerous English cases, it is perhaps sufficient to say that, according to the doctrine of the English courts of chancery, the will would certainly not be a good execution of the power. The cases are summed up and reviewed in *Doe* v. *Roake*, 2 Bing. 497, and in *Blagge* v. *Miles*, 1 Story R. 426. The distinction between "power" and "property" is carefully preserved through all of them; and the refinements and subtleties to which this distinction leads are great and perplexing. The general rule is thus stated by Chancellor Kent, in his Commentaries: "In the case of wills, it has been repeatedly declared, and is now the settled rule, that in respect to the execution of a power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power became clear and manifest." "The intent must be so clear that no other reasonable intent can be imputed to the will; and if the will does not refer to a power, or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then, unless the intent to execute the power be clearly expressed, it is no execution of it." 4 Kent Com. (6th ed.) 335. And Mr. Justice Story, in *Blagge* v. *Miles*, gives three classes which "have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in

the will, or other instrument, to the power; (2) Or a reference to the property which is the subject on which it is to be executed; (3) Or where the provision in the will or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation, except as an execution of the power." He adds that these are not all the cases, and that it was always open to inquire into the intention under all the circumstances; while he agrees that "the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation." And it has uniformly been held that a mere residuary clause gave no sufficient indication of intention to execute a power.

But the inconvenience and injustice to which the English doctrine gave rise have been a constant subject of remark by the judges who applied it. Thus in *Jones* v. *Tucker*, 2 Meriv. 533, a case which perhaps illustrates as well as any how far the rigid application of a rule can go in misconstruction, where a woman had a power to appoint £100 by her will, and bequeathed to the plaintiff £100, having no property of her own to answer the bequest except a few articles of furniture, Sir William Grant said: "In my own private opinion, I think the intention was to give the £100 which the testatrix had a power to dispose of, but I do not conceive that I can judicially declare it to have been executed."

So in *Hughes* v. *Turner*, 3 Myl. & K. 688, Sir John Leach remarked: "The question in this case arises from the distinction which has been adopted and settled in courts of equity between the power of disposing of property, and the technical right of property; a distinction which has been regretted by eminent judges, and which as Lord Eldon has observed, although professed to be adopted in order to further the intention of the testator, in nine cases out of ten defeats that object." He held the power executed. But after his death, the case was reheard by his successor as Master of the Rolls, who reversed the judgment with the remark, "I fear that the intention of the testatrix may be defeated by my decision."

Lord St. Leonards, the highest authority on any question relating to this branch of the law, says that, "in reviewing the cases, it is impossible not to be struck with the number of instances where the intention has been defeated by the rule distinguishing power from property." Sugden on Powers, (8th ed.) 338.

It is not surprising that a course of decisions obnoxious to such criticisms should be at length controlled by legislation. By St. 7 Will. IV. and 1 Vict. *c.* 26, § 27, it was declared that a general devise of real or personal estate, in wills thereafter made, should operate as an execution of a power of the testator over the same, unless a contrary intention should appear on the will. Upon this English Statute Judge Story observes, in a note to *Blagge* v. *Miles*: "The doctrine, therefore, has at last settled down in that country to what would seem to be the

dictate of common sense, unaffected by technical niceties." 1 Story R. 458, *note*.

We are aware of no decisions in this commonwealth, binding on us as an authority, which should compel us to adopt a rule of construction likely, in a majority of cases, to defeat the intention it is designed to ascertain and effectuate. Seeking for the intention of the testator, the rule of the English Statute appears to us the wiser and safer rule; certainly when applied to cases like the one now under consideration, where the testatrix is dealing with property which had been her own, and of which she had the beneficial use, as well as the power of disposal.

The point to be determined is simply this: Did Miss Amory mean to dispose of the property held under the deed of trust, by the terms of her will, in devising all the estate of which she should be possessed at her death? We can have no doubt that she did. It was originally her property by inheritance. She received the income of it during her life. She had the complete power of disposal over it by will; and it constituted the great bulk of the property over which she had testamentary control. If she died intestate, like the rest of her property, it was to go to her heirs. The trust had been created merely with a view to relieve her, when in feeble health, from the trouble of managing and investing her estate, and with a provision that the trust should be terminated whenever, in her opinion and that of the trustees, it might be expedient. The rest of her property had been transferred, though not to the legal ownership, yet to the care and custody of the same trustees; had been treated in precisely the same manner with that included in the trust; and we can see no reason to believe that it was regarded by her in any different light.

The decree will therefore direct the trustees to convey the property held by them in accordance with the devises and bequests of the will.[1]

E. D. Sohier, for certain of the heirs at law.

R. Olney, for a devisee under the will.

[1] See *Willard* v. *Ware*, 10 Allen, 263 (1865); *Bangs* v. *Smith*, 98 Mass. 270 (1867); *Cumston* v. *Bartlett*, 149 Mass. 243 (1889).

But general words were held not to execute a power, in *Bingham's Appeal*, 64 Pa. 345 (1870); *Burleigh* v. *Clough*, 52 N. H. 267 (1872); *Maryland Benevolent Soc.* v. *Clendinen*, 44 Md. 429 (1875); *Hollister* v. *Shaw*, 46 Conn. 248 (1878); *Bilderback* v. *Boyce*, 14 S. C. 528 (1880); *Meeker* v. *Breintnall*, 38 N. J. Eq. 345 (1884).

SECTION VI.

LAPSE.

CHAMBERLAIN *v.* HUTCHINSON.

CHANCERY. 1856.

[*Reported* 22 *Beav.* 444.]

IN 1816, by the settlement made on the marriage of Mr. and Mrs. De Blanchy, Mrs. De Blanchy assigned to trustees all her personal estate upon trust after the death of herself and her husband, and in default of children of the marriage (which happened), to pay the trust moneys to such persons, &c. as Mrs. De Blanchy by deed or will should appoint, and in default upon trust to pay one-half part to William Knight Thompson, and the other half to Martha Maria Thompson, his sister.

In 1823, Ann Adams, the mother of Mrs. De Blanchy, by her will, gave her daughter a life interest in considerable property, and after her decease, the same was to be in trust to pay one-half of the trust moneys to such person as Mrs. De Blanchy, by deed or will, should appoint, and in default to the children (if any) of her daughter, and in default thereof, upon trust to pay the same to the testatrix's grandchildren, William Knight Thompson and Martha Maria Thompson, in equal shares.

Mrs. Adams (the mother) died in 1832, and in 1838 Martha Maria Thompson married Mr. Bainbrigge.

Mrs. De Blanchy made her will in 1842, and thereby, after directing her just debts and funeral and testamentary expenses to be paid, and after referring to her powers both under the settlement and will, she appointed all the personal estate and effects which she had the power to dispose of to the plaintiff (her executor), upon trust to convert such securities, personal estate and effects into money, and dispose of the same in manner therein following. She then gave several pecuniary legacies, "and as to one moiety of all the rest, residue and remainder of such moneys and property as she was then entitled to appoint, and all other moneys, securities for moneys, personal estate and effects not thereinbefore disposed of," she gave it to her executor, upon trust for her niece Martha Maria Bainbrigge for life, with remainder to her children. And she gave the other moiety to William Knight Thompson absolutely.

Mrs. De Blanchy survived her husband, and died in 1853, and there had been no children of the marriage.

Martha Maria Bainbrigge died in 1844, leaving children.

Wm. Knight Thompson died in 1847, in the lifetime of Mrs. De Blanchy, whereby the bequest to him lapsed.

The question was, to whom the lapsed moiety belonged. The defendant, Charlotte Hutchinson, one of the next of kin of Mrs. De Blanchy, claimed the whole moiety on behalf of herself and the other next of kin of Mrs. De Blanchy. The defendants Bainbrigge and others, though they admitted the claim of the next of kin to such portion of the lapsed moiety as belonged to Mrs. De Blanchy in her own right, insisted on their right, as representing the executors of W. K. Thompson, to the other portion, as being subject to the trusts of the marriage settlement and of her mother's will, according to which trusts, in default of appointment by Mrs. De Blanchy, the trust funds were limited to Wm. Knight Thompson and Martha Maria Bainbrigge in equal shares.

This bill sought to have the rights of the several parties ascertained and declared.

Mr. Roupell and *Mr. Hingeston*, for the plaintiff, the executor and trustee.

Mr. Follett and *Mr. Field*, for parties claiming as in default of appointment.

Mr. Selwyn and *Mr. Roget*, for parties in the same interest.

Mr. R. Palmer and *Mr. A. J. Lewis*, contra.

The Master of the Rolls. [Sir John Romilly.] At the time the testatrix made her will, she had a power of appointment over one fund under her marriage settlement, and over another fund under her mother's will, and she had property of her own. The question is, whether the bequest of the moiety, which lapsed by the death of Wm. Knight Thompson in the lifetime of Mrs. De Blanchy, goes to her next of kin as residue undisposed of, or to the representatives of Wm. Knight Thompson, as in default of appointment. I am of opinion it goes to the next of kin of Mrs. De Blanchy, and not to the representatives of Wm. Knight Thompson, as in default of appointment.

In the first place, there is a general appointment of it by the will to her executor, so as to make it part of her personal estate, and an express direction to pay certain legacies out of the appointed fund. She treats the whole as part of her personal estate, and blends the whole so as to make it part of her general personal assets, and liable to the payment of her debts, legacies, costs of administration and probate, and all other charges which necessarily fall on the general personal estate.

This is a question of intention: in what way is it possible to hold, that if this gift, which was for the benefit of Wm. Knight Thompson, should fail, it should go as if she had made no appointment at all, instead of forming part of her personal estate, and passing, if not otherwise disposed of, to her next of kin? By her will, she has made it part of her personal estate, and she is to be presumed to be cognizant of the law which makes it devolve as part of her property undisposed of.

It is said, apportion the funds. If I accede to the argument of the

defendants, see to what consequences it would lead. I must ascertain what part was her own personal property, and what part was subject to the two powers, and I must then apportion the charges between them.

I am of opinion. that it does not go as in default of appointment, but to her next of kin as part of the residue undisposed of, and I will make a declaration to this effect.

IN RE HARRIES' TRUST.

CHANCERY. 1859.

[*Reported H. R. V. Johns.* 199.]

BY an indenture, dated the 16th day of November, 1850, Gilbert Harries settled two policies of assurance effected upon his life, for £2000 each, and all bonuses and other sums of money which had accrued or might accrue thereon, in trust for all and every or such one or more exclusively of the rest of his children born or to be born of his then wife (except his eldest son Cecil) as he should by deed or will appoint. And in default of such appointment, or so far as any such appointment, if partial, should not extend, in trust for all such children (except Cecil) equally.

The settlor had four daughters and five younger sons.

In September, 1852, Florence, his second daughter, married Mr. Stokes; and by the settlement on her marriage, dated the 15th of September, 1852, Gilbert Harries appointed £1000, part of the said insurance moneys, upon the trusts of that settlement.

In August, 1853, his eldest daughter, Cecilia, married a Mr. Phillips; and by the settlement on her marriage, dated the 18th day of August, 1853, Gilbert Harries appointed the sum of £1000, further part of the same insurance moneys, upon the trusts of her settlement.

In June, 1855, Gilbert Harries made his will, and thereby, after reciting the settlement of November, 1850, and that he had nine children besides Cecil, and reciting the settlements of 1852 and 1853, proceeded as follows: "Now I, the said Gilbert Harries, by virtue and in further exercise of the said power or authority vested in me by the said indenture of the 16th day of November, 1850, and of every other power or authority to me reserved or in anywise enabling me in that behalf, do, by this my last will and testament by me duly executed, direct and appoint, that, subject and without prejudice to the several hereinbefore recited indentures of the 15th of September, 1852, and the 18th of August, 1853, and the appointments thereby made to or in favor of the said Florence Stokes and Cecilia Phillips respectively as aforesaid, the said several sums of £2000 and £2000 secured by the said several policies of insurance on my life, and all bonuses and other sums of money which have accrued, or shall accrue, or be recoverable under or by

virtue of the same policies respectively, shall be paid as follows (that is to say): As to the sum of £1000, part thereof, unto my daughter Georgina Harries, for her absolute use and benefit; and as to the sum of £1000, other part thereof, unto my daughter Louisa Harries, for her absolute use and benefit. And as to the residue and remainder of the said moneys, from and after payment of the said several sums of £1000 and £1000 appointed to or in favor of the said Florence Stokes and Cecilia Phillips respectively by the hereinbefore recited indentures of the 15th day of September, 1852, and the 18th day of August, 1853, as aforesaid, and of the several sums of £1000 and £1000 hereinbefore appointed to or in favor of the said Georgina Harries and Louisa Harries respectively as aforesaid — I direct and appoint that the same shall be paid to my five younger sons," (naming the five petitioners), in equal shares, to vest at twenty-one. And the testator by his will directed, that, if any of his said younger sons should die under twenty-one, then, as well the original portion or share thereinbefore provided for such younger son, as every other portion or share which he or they should by virtue of his will have taken by way of survivorship or accruer, of and in "the said residuary moneys and premises" should from time to time accrue and be paid to the other or others of them, in equal shares. And he directed the income of the share or shares of such of his said younger sons of and in "the said residuary moneys and premises" as should be under twenty-one at his death, to be applied for the respective maintenance, education, or benefit of such son or sons, until the same should become vested. The residue of the testator's own personal estate and effects was, by his will, bequeathed to his eldest son.

Georgina Harries married a Mr. Coleridge, and died in the lifetime of the testator.

The sums, including bonuses, received upon the policies amounted to £5,223 8*s.* 6*d.*, out of which the trustees of the settlement of November, 1850, paid the three sums of £1000 each appointed by the testator in favor of his daughters Florence, Cecilia, and Louisa; and they paid the residue, amounting (after deducting succession duty and costs) to a sum of £2,194 9*s.* 7*d.* (now represented by £2,306 18*s.* 10*d.* consols), into court.

A petition was now presented by the five younger sons of the testator, praying that it might be declared that the sum of £1000 appointed by his will in favor of his daughter Georgina lapsed and fell into the residue of the trust moneys thereby appointed to be paid to the petitioners, and that they were entitled to the same in equal proportions; and that one-fifth part of the residue of the fund in court, after payment of costs, might be paid to, or carried to the account of, each of the petitioners.

Mr. Bevir, for the petitioners.

Mr. Dart, for the trustees of the settlement of 1852; *Mr. Baggallay*, for the trustees of the settlement of 1853; *Mr. Little*, for Louisa

Harries: and *Mr. Chitty*, for Coleridge, the husband of the testator's deceased daughter Georgina.

VICE-CHANCELLOR SIR W. PAGE WOOD. The question in this case is, what is the effect of the appointment made by the testator's will upon certain moneys arising from policies of insurance, and over which he had, by virtue of a settlement made by him in 1850, a power of appointment amongst children to the exclusion of his eldest son.

The course taken by the testator in his will is this: In the first place, he carefully recites the appointments he had previously made by deeds *inter vivos* upon the marriage of two of his daughters, Florence and Cecilia; and after that recital he proceeds thus — [THE VICE-CHANCELLOR read the appointments in favor of the testator's daughters Georgina and Louisa, and the residuary appointment in favor of the five younger sons, as above, and proceeded —] And then he directs, that, if any of his said younger sons should die under twenty-one, their shares "of and in the said residuary moneys and premises" should accrue to the others in equal shares; and, again, he directs that the income of the shares of each of his younger sons "of and in the said residuary moneys and premises" as should be under twenty-one, should be applied for their maintenance — referring, in these expressions, not to his own personal estate, but solely to the moneys to become payable upon the policies; because I observe that the residue of his own personal estate is given to his eldest son.

The question that arises is, whether the £1000 by his will appointed to his daughter Georgina, and which lapsed in consequence of her death in his lifetime, fell into the residue of the moneys to become payable upon the policies, and so passed by the residuary appointment made in favor of the testator's five younger sons (the present petitioners), or whether it is to be regarded as wholly undisposed of by the will, and, therefore, as passing under the limitation in the settlement in default of appointment.

It seems to me, after carefully examining the authorities which were cited, that there is a general principle to be derived from them, although its application to the case of each particular will may not always be easy. If there is a definite fund subject to a power of appointment by will, and a will purporting to be made in exercise of that power, and appointing one sum, part of the fund, to one person, and another sum, other part of it, to another, and "all the rest" or "all the remainder" of the fund to a third, then, according to *Easum* v. *Appleford*, 10 Sim. 274, the third appointee cannot claim any share which may lapse in consequence of the death of either of the former appointees in the lifetime of the testator. Thus, if the fund be £3000, and £1000 being appointed to A., and another £1000 being appointed to B., "all the rest" or "all the residue" of the fund, or "all that may remain of the fund after payment of the sums previously appointed" (for the terms are immaterial), be appointed to C., the appointment in favor of C. will be read as the bequest was in *Page* v. *Leapingwell*,

18 Ves. 463, as if it were an appointment in express terms of "the remaining £1000" to C.; and although A. and B. should die in the lifetime of the testator, their shares would not pass by the appointment in favor of C., who will take the definite balance (£1000) remaining after payment of the sums appointed in favor of A. and B., and no more.

If, on the other hand, you find in the will a plain indication of an intention to appoint the whole that may remain strictly in the shape of residue, as residue is appointed by this will, or to appoint the entire fund charged only with the sums specified in the preceding appointments, then the residuary clause will be read as an appointment, not of the mere balance of the fund after the sums previously appointed have been deducted from it, but of the entire fund *subject* to the appointments previously made, the court acting upon the manifest intention on the part of the testator to dispose of the entire fund over which he has a power of appointment.

Lord Hardwicke's decision in the case of *Oke* v. *Heath*, 1 Ves. Sen. 135, does not materially assist me in determining the present. That case was a very plain one. The testatrix had appointed the whole fund (£4000) over which she had a power of appointment to her nephew, and, after making that appointment, "all the rest and residue of what she had power to dispose of" she gave to her niece. It was as if she had said in so many words, "if anything which I have given by my will fails, I mean to sweep into this residuary bequest all that may so fail." A clearer case than that could scarcely be put.[1]

The case of *Falkner* v. *Butler*, Amb. 514, is more in point. There a widow, under a power given her by her late husband to appoint his residuary estate among such of certain of his relations as she should think most deserving, appointed £700 to a person who was held not to be an object of the power, "and then appointed, that, after payment of the above legacies, the residue of her husband's personal estate should be divided" as in the will mentioned; and that last appointment was held to pass the £700.

Upon that case, Lord Cottenham is reported to have made some observations, of which I do not exactly see the force. He says, "This was a residuary gift, which, in the case of a bequest, would clearly have passed a lapsed legacy;" — treating it as in itself a residue. That is a view with which I scarcely feel satisfied, because, at the death of the husband, the residue of his personal estate must have been as much an ascertained sum as if the amount had been expressly stated; and when the power was exercised, what the testatrix calls "the residue of

[1] Lord Cottenham's observations upon *Oke* v. *Heath* are as follows: — "In that case the donee of the power gave, by her will, part of the fund, absolutely, to a person who died in her lifetime, and gave all the rest and residue of what she had power to dispose of to her niece — in whose favor Lord Hardwicke decided — not the fractional part of a specified fund, but all that should remain subject to her power; which, at the time of her death, was that interest which had been appointed to the deceased." *Eusum* v. *Appleford*, 5 M. & Cr. 59. — Rep.

her husband's personal estate" must have been as much an ascertained sum as if it had been expressed in so many figures. Her husband being dead, I do not see how her calling it a "residue" could make any difference.

In *Falkner* v. *Butler*, however, the court determined "that the £700 lapsed into the residue; and, the wife having appointed the *residue*, it passed by the residuary appointment. No part remained unappointed" (Amb. 515) — treating the will as indicating a wish on the part of the testatrix that the whole residue should pass; and, therefore, holding that it did pass by the residuary appointment, as if that appointment had been in terms of the whole fund subject to the previous charge.

So in *Carter* v. *Taggart*, 16 Sim. 423, decided by the judge who originally determined *Easum* v. *Appleford*, it was held, that, upon the whole of the will, the intention was to pass the entire fund (a sum of £10,000 consols) subject to the previous charges — to pass "not the residue of the £10,000 consols after the sums which the testatrix had given to the other persons named in her will should have been deducted from it, but the £10,000 consols charged with those sums:" the court seeming to be of opinion that such an intention was indicated more particularly by the direction contained in the will, that, with respect to one portion of the fund (£600), the interest of which was to be paid to a legatee for life, the testatrix directed, that, after the decease of the legatee, "it should sink into *the residue* of *her estate*;" "by which," the Vice-Chancellor said, "she plainly means the £10,000 consols, out of which the £600 were given."

Looking to the whole frame and scope of the will in question in the case now before me, that, as it seems to me, is the view which I ought to take of it. The testator begins by reciting the charges he had made upon the proceeds of the policies by the previous appointments, by the indentures of settlement *inter vivos*, and then he appoints, that, "subject and without prejudice to" those indentures and the appointments thereby made, "the said several sums of £2000 and £2000 secured by the policies, and all bonuses and other sums of money which have accrued or shall accrue, or be recoverable, under the same policies respectively" (sweeping in by that comprehensive form of expression the whole fund over which he had a power of appointment), shall be paid as follows (that is to say): — as to £1000, to Georgina, who died in his lifetime; as to £1000, to another daughter Louisa; "and as to the residue and remainder of the said moneys, from and after payment of the said several sums" (the four sums of £1000 which he had previously appointed), he directs and appoints that the same shall be paid to his five younger sons. Now, what was that residue? The entire fund over which he had reserved to himself a power of appointment comprised only the two sums of £2000 each (£4000 in all) and the chance bonuses which might fall in. He had exhausted the whole of the £4000 by the previous appointments in favor of his four daughters, as to two by deed, and as to the other two by will; and if the £2000 which he had appointed to two

of them by his will are to be excluded from the operation of the residuary clause, the only property left remaining for that clause to operate upon will be the surplus in respect of bonuses — the indefinite floating surplus, varying from day to day as he lived longer. But if he had really intended that to be the operation of his will, the simple and natural way would have been to say, "I exhaust the whole of the principal sums secured by the policies by the appointments to my daughters, and then I appoint the bonuses to my five younger sons;" and in that form one would have expected him to express himself had such been his intention. But instead of that he uses the words I have mentioned, "and as to the residue and remainder of the said moneys." It is true he says, "from and after payment of the said several sums" — the four sums of £1000 each — but I do not think that it makes any substantial difference whether the expression be "after payment of" or "subject to" those sums. And then twice in the latter part of his will he calls what is so given to his younger sons "his residuary moneys and premises."

It seems to me plain, that it was the intention of the testator to dispose of the entire moneys secured by the policies, subject only to the charges created by the previous appointments by deeds *inter vivos;* and that by this ultimate appointment of what he describes as "the residue and remainder of the said moneys," he meant to pass the whole of the rest and residue of such moneys, — balance uncertain in its very nature by reason of the bonuses accruing from time to time; and that he meant the whole of that residue and remainder — the whole of his "residuary moneys and premises," as he afterward calls it — to go to his five younger sons.

I think the case falls within the principle of the decisions in *Carter* v. *Taggart* and *Falkner* v. *Butler*, rather than within that of *Easum* v. *Appleford;* and that the £1000 by the will appointed in favor of the testator's daughter Georgina, and which lapsed by reason of her death in the lifetime of the testator, fell into the residue by the will appointed in favor of his five younger sons.

IN RE DAVIES' TRUSTS.

CHANCERY. 1871.

[*Reported L. R.* 13 *Eq.* 163.]

PETITION. Robert Davies, who died on the 23d of September, 1866, by will, in June, 1866, after making certain bequests, gave the residue of his estate to trustees, upon trusts *inter alia*, to convert and invest the proceeds, and to pay the income unto his wife, Sarah Davies, during her life, and after her death, upon trusts, after the payment of certain legacies, as to one equal moiety of his residuary personal estate,

for such person or persons to whom Sarah Davies should by will give, appoint, and bequeath the same. The testator appointed Sarah Davies and two others executrix and executors of his will, but one of the executors did not prove.

Sarah Davies, who died on the 13th of August, 1869, by will, dated the 5th of that month, after declaring that all her just debts, funeral and testamentary expenses, should be paid and discharged, and giving three legacies, which amounted in the aggregate to £150, proceeded as follows: "I give and bequeath all the rest, residue, and remainder of my moneys in the funds, and all moneys due to me on mortgage or otherwise, and all my personal estate wheresoever and whatsoever of which I shall die possessed, or have any title to or interest in, unto my sister Mary Minshall, my sister Elizabeth Green, my brother William Heatley, and my brother Joseph Heatley, to be equally divided between them, share and share alike, as tenants in common; and I appoint George Minshall sole executor of my said will."

Both Mary Minshall and Joseph Heatley died in the lifetime of Sarah Davies.

Letters of administration *de bonis non*, with the will annexed of Robert Davies, were, in January, 1871, granted to the petitioner. Elizabeth Oliver, and she paid into court the sum of £347 6*s*. 3*d*. cash to the credit of "In the Matter of the Trusts of the Moiety of the Residuary Estate of Robert Davies."

Robert Davies died without leaving any issue, but he left next of kin; and they contended that the one equal fourth part of the residuary estate of Robert Davies, to which Mary Minshall and Joseph Heatley would have been entitled if they had survived Sarah Davies, and which amounted to the sum of £347 6*s*. 3*d*., formed part of the personal estate of Robert Davies undisposed of by his will; and that the £347 6*s*. 3*d*., together with any further moneys in the hands of the administratrix representing the said equal fourth part of the residuary estate, was distributable amongst the next of kin of Robert Davies; and they prayed for a declaration accordingly.

Mr. T. N. Lawrence, for the petitioner.

Mr. Waller, for the executor of Sarah Davies.

Sir John Wickens, V. C. Sarah Davies, having a life interest in the whole, and a general power of appointment over a moiety of the residuary estate of her late husband, Robert Davies, made her will, dated the 5th of August, 1869, by which she directed that her debts and funeral expenses should be paid and discharged, and, after giving three pecuniary legacies, proceeded as follows. [His Honor read the words above stated.]

The testatrix survived two of the four persons to whom she bequeathed the residue of her estate, and died on the 13th of August, 1869. As she lived only eight days after making her will, it is to be presumed that the two residuary legatees who died before her died also before the will was made. But this seems for the present purpose

immaterial. The question is whether the next of kin of Robert Davies, or the next of kin of the testatrix, take the two eighth shares of Robert Davies' residuary estate which his widow had power to dispose of, but as to which her intended disposition failed by lapse, or something analogous to lapse.

It seems settled by the cases of *Chamberlain* v. *Hutchinson*, 22 Beav. 444, and *Wilkinson* v. *Schneider*, Law Rep. 9 Eq. 423 — authorities which are binding on me — that a testamentary appointment, under a general power, to A. in trust for B., which lapses as to the beneficial interest by B.'s death before the appointor, operates as a good appointment in favor of A., who holds on the same trusts as if it had been the appointor's own property.

It must also, I think, be considered settled law that where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective. And even that where a testator having such a power makes a will directing the payment of his debts without more and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed. It has not yet been decided that an appointment of an executor without more would, since the Wills Act, 1 Vict. *c.* 26, make the fund assets. And so to hold would appear to give a very unnatural construction to sect. 27 of the Wills Act as to the execution of powers by a general disposition. Having regard to the 27th section, it seems not unreasonable to hold that a testator having a general power, and directing a certain application of his property, must be taken in all cases to exercise the power to the extent to which the direction is effectual. The difficulty lies in extending this rule to cases where the direction is ineffectual. Of course a testator may say, "I appoint to my executor as part of my personal estate," and may expressly, or in the event, leave his personal estate undisposed of; and yet it may be held that he has nevertheless made it part of his personal estate for all purposes. But in general, where the appointment is for a limited purpose, or a purpose which fails, it would seem, on principle, that there should be no appointment at all, or none beyond the limited purpose. Unquestionably there is great difficulty in construing an appointment of, for instance, an equitable interest in a money fund to A. in trust for B. as differing from an appointment of the same fund to B.; and doubts might be suggested as to the effect of such a gift where A. died before the testator as well as B., or where there is an appointment, for example, to a person in trust for A. for her separate use, with remainder to her children, no executor being named, and there being no children. Still, though there is binding authority for holding that a bequest of residue to A. in trust for B. makes the fund, subject to a general power, assets for all purposes of the appointor, it does not appear to have been yet decided that

where there is no appointment to A., but merely an appointment to B. direct, and B. dies before the testator, the result is the same. Here there is an appointment, which, under the old law as well as the new, would make the appointed fund assets for debts to the extent of any deficiency of the appointor's personal estate; and (at any rate under the new law) would make it assets for paying the legacies in case of a like deficiency. There is then a general gift and appointment of residue which fail as to two fourth parts of it. And the real question is, whether I am bound to hold that these two fourth parts (after payment of all debts and legacies) are effectually appointed for every purpose. No authority seems to go so far; and though to hold otherwise tends to draw a line between gifts not quite satisfactorily distinguished in principle, it seems less dangerous to do this than to adopt the opposite view, and to hold what would, in many cases, carry the effect of a will far beyond its intention. I therefore decide that the next of kin of the husband are entitled. The costs will be as between solicitor and client, and must come out of the fund; and, the administratrix requesting it, I shall direct an inquiry as to the next of kin of Robert Davies.

EALES *v.* DRAKE.

CHANCERY DIVISION. 1875.

[*Reported* 1 *Ch. D.* 217.]

UNDER a deed dated the 6th of August, 1856, a sum of £10,000 charged on real estate was directed to be held upon trust for the children of Charles Thomas Eales in such shares, proportions, and manner as Charles Thomas Eales should by deed or will appoint, and in default of and subject to any appointment as to £5, part of the trust fund, for Harriet Sarah Eales (a child of Charles Thomas Eales), and as to the residue thereof for George Daniel Eales and John Thomas Eales (children of Charles Thomas Eales), in equal shares as tenants in common: and there was the usual hotchpot clause.

By a deed-poll dated the 11th of December, 1860, Charles Thomas Eales appointed the sum of £3000, part of the sum of £10,000, to George Daniel Eales.

By his will, dated the 11th of January, 1870, Charles Thomas Eales appointed £1995, part of the £10,000, to Charles Eales; £4000 further part thereof to George Daniel Eales; a second sum of £4000, further part thereof, to trustees upon trust for John Thomas Eales for his life or until he should become bankrupt or encumber the same, and after the determination of such interest, upon trusts for the benefit of the wife and children of John Thomas Eales; and £5, the remaining part thereof, to Harriet Sarah Eales.

By a codicil dated the 21st of July, 1871, Charles Thomas Eales revoked the trusts of the second sum of £4000, by the will limited to take effect after the determination of the trust in favor of John Thomas Eales, and directed that from and after the determination of the last-mentioned trust, and subject thereto, the trustees should stand possessed of the second sum of £4000 upon trust for Charles Eales, George Daniel Eales, and Harriet Sarah Eales, in equal shares as tenants in common.

Charles Thomas Eales died on the 24th of February, 1874.

George Daniel Eales on the 19th of February, 1874, in the lifetime of Charles Thomas Eales.

This suit was instituted for the purpose of ascertaining the rights of the parties interested in the sum of £10,000, and now came on to be heard.

The questions were, whether the appointees under the will of Charles Thomas Eales were entitled to be paid the sums appointed to them in full; and whether John Thomas Eales was bound to bring into hotchpot the life and reversionary interests appointed to him by the will.

Chitty, Q. C., and *Chapman Barber*, for Charles Eales.

Bagshawe, Q. C., and *Cracknall*, for John Thomas Eales.

Langworthy, for the other parties.

Jessel, M. R. I shall say a few words on the first point, as there appears to be no authority which covers it.

The case is this. A testator, having power to appoint £7000 by will, thinks he has power to appoint £10,000; and accordingly makes a will appointing sums of £1995, £4000, £4000, and £5. If nothing more had happened it is quite clear that all these gifts must have abated, because there is not enough to pay the bequests in full. But one of the appointees has died, which augments the fund, exactly in the same way as if the testator had given pecuniary legacies of greater amount than his whole personal estate; and then one of these legatees had died. In that case the personal estate would have been augmented for the benefit of the other legatees, and the appointees here are in the same position.

As regards the other point, it is quite clear that both life interests and reversionary interests must be brought into hotchpot. The value of them must be ascertained in the best way you can; and if you cannot agree, there must be an inquiry at chambers on the subject.

SECTION VII.

APPOINTED PROPERTY AS ASSETS.

THOMPSON *v.* TOWNE.

CHANCERY. 1694.

[*Reported* 2 *Vern.* 319.]

J. S. on sale of lands, takes a bond from the purchaser to pay any sum or sums of money not exceeding £500 as he should by will appoint, and J. S. by will distributes it, and appoints payment of it to several of his relations. The bill was brought by creditors of J. S. for satisfaction out of assets, and (*inter alia*) to have the £500 applied towards payment of their debts.

PER CUR. J. S. having power to dispose, the £500 must be looked upon as part of his estate, and decreed it to be assets liable to the plaintiff's debts.[1]

BAINTON *v.* WARD.

CHANCERY. 1741.

[*Reported* 2 *Atk.* 172.]

GEORGE WARD having a power to charge Isabella, his wife's estate with a sum not exceeding £2000, and having by his will devised £500 apiece to his two sisters, and dying in debt to the plaintiffs.

The question was, Whether that appointment to the two sisters should be good to defeat the creditors from having satisfaction out of the £2000 as part of George Ward's personal estate.

Mr. Brown, for the plaintiff, cited *Lassells* v. *Cornwallis*, 2 Vern. 465, and *Shirley* v. *Ferrers*, the third or fourth cause before Lord Talbot.

This power was given by a settlement after the marriage of George Ward, as follows: "provided always, and it is hereby further declared, by and between the parties to these presents, that George Ward shall, by appointing two trustees under any deed in his lifetime, or by his will at his death, charge all the wife's estate with a sum not exceeding £2000."

LORD CHANCELLOR [HARDWICKE]. I am of opinion that this ought to be considered as the personal estate of George Ward; where there is a general power given or reserved to a person for such uses, intents,

[1] The decree was affirmed in the House of Lords.

and purposes as he shall appoint, this makes it his absolute estate, and gives him such a dominion over it, as will subject it to his debts.

For it would be a strange thing, if volunteers, as the legatees are, should run away with the whole, and that creditors for a valuable consideration should sit down by the loss without any relief in this court.

The case of *Shirley* v. *Lord Ferrers* is directly in point.

This money was not settled at all, but absolutely in the power of George Ward, and consequently there can be no doubt but his creditors must have the benefit of it.

Supposing a man has a power to dispose, by appointment, of a reversion in fee, and makes no disposition of it, yet it shall be assets to satisfy specialty creditors.[1]

HOLMES *v.* COGHILL.

CHANCERY. 1802.

[*Reported* 7 *Ves.* 499.]

By the settlement, previous to the marriage of Sir John Coghill, Bart., dated the 15th and 16th of October, 1754, estates in Ireland, in fee simple, in the counties of Kilkenny and Cavan, and leaseholds for lives in the county of Kildare, were settled to the use of Sir John Coghill for life: with remainder, subject to an annuity by way of jointure and a term for raising portions for younger children, to the first and other sons of the marriage in tail male; and it was declared, that Sir John Coghill should have full power by any deed or writing to be by him subscribed, sealed, and executed, in the presence of three or more credible witnesses, or by his last will and testament, by him signed, published, and declared, in the presence of the like number of witnesses, to charge the said premises in the counties of Kilkenny, Cavan, and Kildare, with any sum, not exceeding £2000, for such uses and purposes as he should think proper, but without prejudice to the aforesaid jointure and portions.

Sir John Coghill was also entitled under a will to estates in the counties of Meath and Dublin; with remainder in tail to his eldest son; who attained the age of twenty-one in 1787. Soon afterwards they joined in suffering recoveries of all the estates, except the leaseholds; and by indentures of settlement, dated the 29th and 30th of June, 1787,

[1] His Lordship directed the personal estate to be first applied towards payment of the debts, then the real estate descended, and then the £2000. *Reg. Lib. A.* 1740, fol. 613. — *Sanders's note*; and see *Fleming* v. *Buchanan*, 3 De G. M. & G. 976 (1853).

Property appointed under a general power is assets, although the power can be exercised by will only. *Edie* v. *Babington*, 3 Ir. Ch. 568 (1854); *Clapp* v. *Ingraham*, 126 Mass. 200 (1879).

The doctrine that property appointed under a general power is assets was disapproved in *Comm.* v. *Duffield*, 12 Pa. 277 (1849).

they conveyed to trustees and their heirs the estates in the counties of Kilkenny, Meath, and Dublin, and the leaseholds in the county of Kildare, subject to the jointure and provision for younger children, but freed and forever discharged of and from all right and power by the said settlement reserved to Sir John Coghill by deed or will to charge and encumber the premises in the counties of Kilkenny and Kildare with any sum, not exceeding £2000, for such uses and purposes as he should think proper.

This conveyance was declared to be in trust for securing an annuity to the son, and then to trustees for a term of 200 years; and subject thereto, to the joint appointment of the father and son; and, in the mean time and until default of appointment, to Sir John Coghill for life; and then to the survivor of him and his son. The trust of the term of 200 years was declared to be for securing the annuity to the son; and then, that the trustees should at the request and desire of Sir John Coghill, to be signified, and to be by him signed, by demise, sale, and mortgage, of the premises in the counties of Meath and Dublin, comprised in the term, or of a competent part thereof, or by such other ways and means as they or the survivor, &c. shall think fit, raise and levy such sum or sums of money as Sir John Coghill should direct and appoint, not exceeding in the whole £2000; and pay the same to Sir John Coghill or his assigns in his life-time to or for his and their own use forever; or if the same or any part thereof shall not be levied, raised and paid over, to him and assigns in his life-time, then upon trust by all or any of the ways and means aforesaid to raise and levy the same at such time and times, and to pay over the same to such person or persons, as Sir John Coghill should by deed, or by his last will by him duly executed and attested by two or more credible witnesses, direct and appoint; and then upon farther trust to indemnify the aforesaid lands in the county of Cavan from all charges affecting the same; and then upon farther trust to raise a farther sum in addition to the portions under the settlement.

Sir John Coghill by his will, dated the 9th of September, 1775, and several codicils, executed and attested so as to pass real estate, gave the sum of £2000, to be raised under his power, and all the rest and residue of his personal estate, goods, and effects (except his furniture at Coghill Hall, which he directed to be appraised, and delivered at the appraised value to his son), and the amount of such appraisement, with the above fund to be applied towards payment of his debts; and he appointed his wife and two other persons executrix and executors. He died in March 1790. One of the codicils was subsequent to the deed of 1787: but it took no notice of the power; and was for a distinct purpose, wholly unconnected with it.

The bill was filed by simple-contract creditors against the widow, who alone proved the will, and against Sir John Thomas Coghill, the eldest son and heir-at-law of the testator; praying an account and payment of their debts, an account of the personal estate; and that if any

part of the personal estate has been applied in payment of specialty debts, for so much the simple-contract creditors may stand in the place of the specialty creditors upon the real estates, of which the testator was seised, or in which he had such an interest as may be affected with specialty debts; and receive satisfaction thereout.

The defendants stated by their answers the accounts; from which it appeared, that the personal estate and the real estate descended were insufficient for the specialty debts. The general question therefore was, whether the plaintiffs could avail themselves of the fund, which was the subject of the power; considered either as the absolute property of Sir John Coghill; or the power being executed by the codicil, as republishing the will; or the want of execution to be supplied in equity.

Mr. Romilly and *Mr. Hall*, for the plaintiffs.

Mr. Alexander and *Mr. Fonblanque*, for the defendants.

The Master of the Rolls. [Sir William Grant.] The question in this cause is, whether the sum of £2000 which Sir John Coghill had power to raise, should be considered assets for his debts. The creditors contend, first, that he has executed the power. If he has, there is an end of the question. If he has not, secondly, they insist, that this sum is substantially his property; as he had an absolute power to appoint it.

As to the first point, it is clear, the only power in existence at his death was created by the deed of 1787. The power reserved by the marriage settlement was discharged for valuable consideration. That power he had executed by his will. But the power itself being gone before his death, the will had nothing to operate upon; unless it can be applied to the new power, created for appointing the same sum, to be raised out of different estates. It is admitted, he has not directly executed the new power. But it is said, that subsequent to the creation of it, he executed a codicil that has the effect of republishing the will, and making it speak as at the time of the republication. Be it so. It speaks only of the power given by the marriage settlement; which was as much gone, as if it never had existed. There is no way, in which the will can be made to speak of the new power, for a new consideration, affecting different estates. I am clearly of opinion, there is no execution of this power.

Upon the second point, there is an evident difference between a power and an absolute right of property: not so much with regard to the party possessing the power, as to the party to be affected by the execution of it. If our attention is to be confined to the former entirely, there is no reason, why the money he has a right to raise should not be considered his property, as much as a debt he has right to recover. But the latter can only be charged in the manner, and to the extent, specified at the creation of the power. The compact is not to raise £2000 absolutely, and in all events; but, that it may be raised in a certain manner: namely, according to his appointment by deed or will, to be duly executed, and

attested by two or more witnesses. To say, that without a deed or will this sum shall be raised, is to subject the owner of the estate to a charge in a case, in which he never consented to bear it. The chance, that it may never be executed, or, that it may not be executed in the manner prescribed, is an advantage he secures to himself by the agreement; and which no one has a right to take from him. In this respect there is no difference between a non-execution and a defective execution of a power. By the compact the estate ought not to be charged in either case. It is difficult therefore to discover a sound principle for the authority this court assumes for aiding a defective execution in certain cases. If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed, wherever it is manifested; for the owner of the estate has nothing to do with the purpose. To him it is indifferent, whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possessor of the power and the party, in whose favor it is intended to be executed. As against the debtor it is right, that he should pay. But what equity is there for the creditor to have the money raised out of the estate of a third person in a case, in which it was never agreed that it should be raised? The owner is not heard to say, it will be a grievous burden, and of no merit or utility. He is told, the case provided for exists: it is formally right: he has nothing to do with the purpose. But upon a defect, which this court is called upon to supply, he is not permitted to retort this argument; and to say, it is not formally right: the case provided for does not exist; and he has nothing to do with the purpose. In the sort of equity upon this subject there is some want of equality. But the rule is perfectly settled; and, though perhaps with some violation of principle, with no practical inconvenience. But farther than supplying a defect in the execution the court has never gone. In *Lassells* v. *Lord Cornwallis* the Lord Keeper says, 2 Vern. 465, that "the court has not gone so far as, where a man has a power to raise money, if he neglect to execute that power, to do it for him; although he thought it might be reasonable enough, and agreeable to equity in favor of creditors."

At the opening I was strongly impressed with an idea, that there was no authority for the proposition contended for by the creditors. None was adduced, except some generality of expression in Atkyns's statement of the judgment in *Bainton* v. *Ward*. There is no such general proposition necessary to the decision of that case; for the whole sum was appointed; in which particular the statement is more correct, as introduced (2 Ves. 2) in the report of *Lord Townshend* v. *Windham;* and there Lord Hardwicke lays it down expressly, that without an appointment no person could be entitled to the money; though the power was as large as in this instance. It was argued, that

because the court will for creditors lay hold of the money, when it is appointed for a volunteer, the court ought to lay hold of it for them, though there is no appointment; for in the former case the application is against his intention. But in the given case the money is already raised by a due execution of the power; and the court only directs the application. It does not follow, that by its own act it shall charge the estate, when the power is not executed, nor attempted to be executed. Many of the cases cited determine only, that a limited gift to a man, with a power to dispose of the thing given, will carry the ownership. But there is no doubt, this is a power in the proper sense of the word; and the power not having been executed, I am of opinion, the money cannot be raised.[1]

SECTION VIII.

EXCESSIVE EXECUTION.

THWAYTES *v.* DYE.

CHANCERY. 1688.

[*Reported* 2 *Vern.* 80.]

J. S. HAVING four children (to wit) two sons and two daughters, settles his estate on trustees to the use of himself for life, remainder to his wife for life, and after their decease, to the use and uses of such child and children, and in such shares and proportions as he should appoint by any writing to be by him signed in the presence of two witnesses, and in default of such appointment, to his eldest son in tail. He by his will by him signed, and attested by several witnesses, devises a rent-charge out of those lands to his youngest son for life, and *to the first and other sons* of his body successively in tail, and further wills that in case his said son die without issue male, so as the estate should come to his eldest son, then he to pay five hundred pounds apiece to his daughters: the son dies without issue, the bill was brought by the daughters, to have their five hundred pounds apiece according to the will.

The defendant who was the eldest son by way of plea, set forth the deed of settlement and power, *prout*, and insisted that the power was not well pursued nor executed by the will, (to wit) that the testator might have distributed the land amongst his younger children, in what proportions he thought fit, but had not power to grant or devise a rent-charge, or sums of money, as he had taken upon him by his will to do.

But the court [LORD JEFFREYS, C.] disallowed the plea, and ordered the defendant to answer the bill.[2]

[1] The decree was affirmed by Lord Erskine, C., 12 Ves. 206.

[2] Followed by Lord Hardwicke, C., in *Roberts* v. *Dixall*, 2 Eq. Cas. Ab. 668 (1738), and by Sir William Grant, M. R., in *Kenworthy* v. *Bate*, 6 Ves. 793 (1802). In this

ALEXANDER *v.* ALEXANDER.

CHANCERY. 1755.

[*Reported* 2 *Ves. Sr.* 640.]

JAMES ALEXANDER by will bequeaths to two trustees £6000, describing particularly the funds of which it consisted, upon trust to pay the interest and produce to his wife for life, and directs them to place the same out at interest with her consent; "and I give unto my said wife the absolute disposal of the said sum of £6000 unto and among such children begotten between us, and in such proportion as she shall by last will and testament, or by any other deed or deeds, writing or writings, to be executed by her in her life-time, attested by two or more credible witnesses, direct, limit, and appoint;" then directs the trustees to pay the same according to such will or appointment; and for want of such a will or appointment, that the said £6000 should fall into and go in the same manner as the residue of his personal estate; but if his wife should think fit to apply in her life-time any part of the said £6000 as an increase of any of the portions given by the will to his said children, or any of them, for their better advancement in marriage or otherwise in the world, then the trustees should out of the said £6000 issue and pay such part thereof for the benefit of such children, as his wife should by any writing as aforesaid direct and appoint.

The mother makes her will, there being then five of the children living, she thereby recites her power, and in pursuance thereof gives to her daughter Anne £100 to be paid out of the sum of £5390, which she computed to be the only remaining sum of £6000 after deducting what she had before paid to some of her children; and as to the remaining produce after payment of the said £100 she disposes to her daughter Mary and son James for their own respective use each one full fourth part thereof (the whole into four parts equally to be divided), and to the said Mary and James also the other remaining two-fourth parts; but as to those two-fourth parts upon the trusts following; viz. as to one of the same to place out or continue on securities during the life of their sister, her daughter Catherine, wife of Thomas Clipperton, and to pay the interest thereof to such person or persons and for such purposes as she shall from time to time direct, and in default of such direction into her own proper hands, my will being, that such interest shall be for her separate use and disposal, and not subject to the debts, control or engagements of her present or any future husband; and upon trust at her decease to pay and apply the principal of such fourth

last case estates were conveyed to the use of such child or children of A. as A. should by his will give, direct, limit, and appoint, and A. appointed the estates to trustees in trust to sell and divide the proceeds among his children. *Held*, a good execution of the power.

part to such child or children, if any, as she shall happen to have living at her decease, in such manner as she shall by writing under her hand in nature of a will or otherwise appoint; and, for want of such appointment, to such child, if but one, if more to them equally; in default of such child or children the principal of such fourth part, if she survives her husband, to be wholly paid to her for her only use and benefit; but if she dies in his life, the said principal at her decease to go to the said James and Mary, yet for their own respective benefit only as for one-third part thereof to each of them; and as to the other third part thereof, and also as the other of such remaining two-fourth parts, whereof no disposition is herein yet made, upon trust, to pay and apply the principal and interest thereof or any part of either from time to time weekly or otherwise in such manner as said Mary and James, their executors, administrators, or assigns, shall in their discretion think most beneficial for the personal support and maintenance of their brother, my son Francis, and his wife and children, but not for the payment of his debts.

Sir Thomas Clarke [M. R.] said, there were some particularities in the case, and he would consider of it, and the next day delivered his opinion.

Considering the nature of the power, the wife was confined as to the objects to give it to, but left to her discretion as to apportioning it among them. In consequence of this she was obliged to give the whole among the children; every child must have some; such share as she pleased; provided not illusory; which has been the language of the court as to such appointments. If then she might apportion as she pleased, it is necessarily implied in that, that she might apportion it out in such manner as she pleased; for it is such kind of proportions, as she should think fit; and therefore the power in the first part of the will does not differ from the latter part, where the word *manner* is added: for the first word means kind of proportions. This is the nature of the power: consequently she might give an interest for life in a particular share to one child, or limit the capital of the same share to another, or even go far as to limit it to a third child upon a contingency; provided she doled out the whole in this various way among all the children only. One restriction she was under, that she could not have given any one child merely a reversionary interest; for it was intended as a provision, and therefore it would be deemed illusory. The power did not require that she should dole it out in gross sums, and give each child an absolute interest in that gross sum; for which among several other cases *Thwaytes* v. *Day*, 2 Ver. 80. is a strong authority, that such a power will enable the giving particular interests and to apportion such interest, as a general power of apportioning land itself would. As this is necessarily implied, there is nothing in the objection, that where this is designed, the power is more extensive, and words added.

As this is the nature of the power, consider what is done under it.

It is observable, that in consequence of the nature of the power the mother has given to each of the five children then alive a share in possession, not merely a reversionary interest; which I should have doubted whether it would be good. The £100 to Anne, and the one-fourth of the residue to James, and the other fourth to Mary absolutely, are undoubtedly good; so is the interest to Catherine for life in the other fourth part; and the giving it to her separate use is so far from being an objection, that it is more strictly carrying into execution the will of the father, a stronger execution of the power agreeably to his intent. But next the provision for the children of Catherine is not a good appointment. The mother had a power to do something similar to this, but in another way: for though that power would have enabled her for better advancement in marriage to make a strict settlement, that is implicitly contained in that power to limit any share she thought fit to give for advancement of marriage, in that way, but she has not taken that method; for she has made a disposition of it by her will, and therefore it must correspond with every circumstance in that will. No case will, under a power to appoint to children, warrant to give to grandchildren; there is a case in point to that, if it needed it, in Vernon: but it clearly cannot. *Thwaytes* v. *Day* is more like an authority on that side of the question; but that is no authority to contradict the reason of the thing, that the appointment to the children is bad. Next, as to the contingent interest to Catherine if she had no children and she survived her husband; but in default thereof two-thirds to James and Mary, the other third to go over with the other fourth to Francis: suppose Catherine leaves children at the time of her death, it is impossible any of these limitations over should take effect: it will fall into the residue, because it was no appointment, being only a partial appointment of that fourth, given only to Catherine for life; and the children, though they could not take themselves, would yet prevent the limitation over. But the most material limitation is that given last to Francis, his wife and children. Consider the effect of this appointment: first on a supposition that this discretionary power was good, and had been exercised by James and Mary. It is clear they could not have duly exercised that power without giving a share to the wife and children of Francis: otherwise it is not consistent with the mother's intent: nor can I say they could discreetly have given the whole to Francis; and it is clear, that if they had exercised this power to the wife and children, it would have been bad. If they had given anything (as they must something in consequence of their power) it would have been giving so much contrary to the intent and effect of the power: but I am clearly of opinion, this discretionary power was not good; because, if there is a power to A. of personal trust or confidence, to exercise his judgment and discretion, A. cannot say this money shall be appointed by the discretion of B., for *delegatus non potest delegare*. It was determined by Lord Chancellor in *Attorney-General* v. *Berryman*, Feb. 11, 1752; where a personal estate was

given to such charitable use as one Dr. Berryman should appoint; he directed the money to be applied as another Dr. Berryman his brother should appoint: which the court would not allow. Next consider the consequence of this: if the power could not be exercised, will it devolve on the court? It clearly cannot; for powers devolving on the court are powers well created in the original, but such as by accident, as the death of persons, cannot be executed by those persons: there is a natural substitution of the court in the room of those persons. But if a power is void in the original, there is nothing to devolve on the court. It is the same as if the mother had given it herself indefinitely for the benefit of Francis, his wife and children laying the discretionary power out of the case, as if never inserted in the will; and certainly so far as the wife and children were to have the benefit of it, that would not be good. Nobody could say how much the wife and children were entitled to, because it is given indefinitely. Had it been free from that circumstance of uncertainty, how much each was to take, it would be void as to the wife and children just as that given to Catherine. Suppose she had given it to the husband, his wife, and children, in gross sums absolutely equally to be divided, that would have been bad and an excess of her power; and if it had been such a partial appointment, so far as void it would have fallen into the residue. The material question then is as to the consequence of this; whether the wife and children being incapable of taking will carry the whole to Francis, or whether any *medium* can be found out; it is said to carry the whole to Francis: because the execution of a power may be good in part and bad in part: and that even at law an irregular execution of a power will be supported, and not amount to an execution at all; and that in many cases only the excess of a power will be void, the residue good. All that I admit; first that the execution of a power may be good and bad in part: but the consequence of this will be various, as the circumstances of the cases are. As suppose a power to a man to appoint £1000 among his children; he appoints £100 among the children, and £900 among others who are strangers: the appointment of the £900 will be so absolutely void, as that it will not be prevented from going over, if limited over for want of appointment, as if he had made none; and something of this has happened in this case, or may happen as to Catherine. On the other hand if the father gives the whole £1000 to his children, and annexes a condition, that they shall release a debt owing to them, or pay money over, the appointment of £1000 would be absolute; and the condition would be only void: and the boundaries between the excess and proper execution are precise and apparent. The ground and principle of all this is, that where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad. Suppose, one has power to jointure a wife for life, and appoints

to her for ninety-nine years, if she so long live, as in the case of Mr. Newport, at law it was held in B. R. to be void, but in equity good *pro tanto;* because he has done less than his power, and it clearly appears how much less; the boundaries are clear and distinguishable; if the wife should outlive the ninety-nine years, the estate as to the residue of her life will be undisposed, and will go over to the remainder or other person entitled. Now to put a case *vice versa*, suppose a power to lease for twenty-one years, and he leases for forty: that shall be good for the twenty-one, because it is a complete execution of the power, and it appears how much he has exceeded it. If the court can see the boundaries, it will be good for the execution of the power, and void as to the excess. Now is this appointment for benefit of Francis, his wife, and children, a complete execution as to Francis? (for that is contended for.) I think certainly not; for the wife and children were to have something and so far as something is designed for them it is bad, and no possibility to distinguish how much she has exceeded the power; it falls therefore within neither of those circumstances, which are essentially necessary. But it is proper to consider if there is no other way to make this good; because the court will strongly lean in favor of that side, if it can. I own, I incline to think there is a method: suppose the mother, instead of using the words she has, had given this one-fourth to be applied in such way as most beneficial for her son and his wife and children, if they shall by law be capable; I should not have doubted, but that as the wife and children are not by law capable, it would be absolute to Francis; and the question is, whether there is any difference? This bears an analogy to what the dispositions by the mother would be, if she had given it to a son by name, who never appeared to have existence, or was never capable of taking; if given to these four indefinitely, and three were incapable of taking, the fourth would have the whole, must take such, as the others were incapable of taking. It falls within the reason of the late case of *Humphrey* v. *Taylour;* where a personal estate was given to two in joint-tenancy; one was outlawed; and therefore the testatrix made a codicil, whereby she adeemed what was given to one of the two; the question was, whether the other joint-tenant should take only a moiety? But the court held, he was to take what the other did not, they were to take the whole between them. The mother never designed this fourth part should fall into the residue; and it would be extremely hard that it should. Then he will be entitled to the whole of that. As to the subsequent restraint, that it should be exempt from debts, she has there exceeded the power given by the law, as in the other case she exceeded the power given by her husband; for it will be left to take the fate of being his property and subject to be come at, as his creditors shall think fit.

I declare therefore, that the execution of the power, so far as it concerns other persons than the children of the testator, is void and of no effect.

NOTE. — At the bar was cited the case of Lord Conway, who, having power to grant leases of his estate by one instrument, granted several; some of which were not within the power; and though all were within the same instrument, they were considered as several leases, and it was sent to the master to separate them.

Also, the *Dean and Chapter of St. Paul's Case*, to show that where a power exceeded is void at law in the whole, this court will hold it good as an agreement, and direct a specific performance, restraining the contract according to the power; as was done there.[1]

TROLLOPE *v.* LINTON.

CHANCERY. 1823.

[*Reported* 1 *S. & St.* 477.[2]]

By articles of agreement made previous to the marriage of Sir John Trollope with Miss Ann Therold it was covenanted that the real estates of that lady should be settled, in consideration of the marriage, to the use of her father for life, remainder to Sir John Trollope for his life, remainder to her for her life, remainder to the use of such one or more of the children of the marriage, for such estate or estates, in such parts, shares, and proportions, and in such manner and form as Sir John, by deed or will, should direct or appoint, with remainder in default of appointment to the children equally as tenants in common in tail with cross-remainders in tail, and remainders over.

Soon after the execution of these articles of agreement the marriage took place, but no settlement was executed pursuant to the articles. Sir John, by his will, reciting that no settlement had been made, expressly confirmed the agreement, and directed that it should be

[1] See also *Crozier* v. *Crozier*, 3 Dr. & W. 353 (1843), where Sir E. B. Sugden, L. C., *held*, that a good appointment in remainder after an appointment for life to A., who was not an object of the power, was not accelerated, but that during the life of A. the property went as in default of appointment.

But cf. *Craven* v. *Brady*, L. R. 4 Eq. 209 (1867); s. c. L. R. 4 Ch. 296 (1869).

See also *In re Kerr's Trusts*, 4 Ch. D. 600 (1877), where SIR G. JESSEL, M. R., said (p. 60 2): "*Alexander* v. *Alexander* is not quite in point. There were various questions in that case, but the actual decision was, that under the particular circumstances, the son was entitled to the whole of the appointed fund. Sir Thomas Clarke read the will as if the words were, 'to my son Francis and his wife and children, if they shall by law be capable.' In saying that the reasoning was 'very artificial' and 'not satisfactory,' Lord St. Leonards means to say it was unsound reasoning, and I agree with him. The Master of the Rolls had no right to put into the will the words he did. The decision in effect was, that although there was no possibility of ascertaining what shares the appointees were intended to take, yet the one object of the power took the whole. That decision has been overruled by later authorities."

[2] Only so much of this case as relates to one point is given, and the following short statement is substituted for that in the report.

performed, and then made an appointment to the use of trustees for a term of 500 years, upon certain trusts for raising the sum of £5,000 as a portion for each of his younger children. At Sir John's death he left a widow and several children.

The bill was filed by the younger children against their eldest brother, their mother, and the trustees. It prayed that the will might be established and the trusts of it performed.

The cause now came on to be heard; and the following question, among others, arose for the decision of the court: Whether the power of appointment mentioned in the articles authorized Sir John Trollope to create a term of 500 years in his wife's estates?

Mr. Bell and *Mr. Barber*, for the plaintiffs.

Mr. Hart and *Mr. Pemberton*, for Lady Trollope.

Mr. Trollope, for the trustees under the will.

Mr. Lovatt, for the eldest son.

SIR JOHN LEACH, V. C., held that creating a term of 500 years in trustees was a good legal exercise of a power to appoint for such estate or estates, in such parts, shares, and proportions, and in such manner and form, as the appointor should think fit; and that the words "manner and form" enabled him to give equitable estates to his children.

SADLER *v.* PRATT.

CHANCERY. 1833.

[*Reported* 5 *Sim.* 632.]

BY the settlement on the marriage of James Sadler with Elizabeth Williams, dated the 19th of May, 1807, a sum of stock belonging to the lady, was settled in trust for her separate use, during her life, and, after her decease, in trust for her husband, for his life, if he survived her, and, after the death of the survivor, in trust for all and every the child or children of the marriage, or any such one or more of them exclusive of the rest, and in such parts, shares and proportions and manner, and at such ages or times, and subject to, with and under such powers, provisos, conditions and dispositions, such dispositions to be for the benefit of some one or more of such children, as the intended wife, by deed or by her will, should appoint; and, in default thereof, in trust for the children of the marriage in equal shares, the shares of sons to be vested in them at twenty-one, and the shares of daughters, at twenty-one or marriage, which should first happen, and to be transferred to them at the same ages or times respectively, if the same should happen after the decease of the survivor of the husband and wife, but, if the same should happen during their joint lives or the life of the survivor, then immediately after the decease of the survivor: and in case there should be no child of the marriage who should

become entitled to the fund under the trusts aforesaid, then in trust as therein mentioned.

There was issue of the marriage four children, the defendants James H. C. Sadler, Albinia Sadler, William Braham Sadler, and the plaintiff, H. H. Sadler, the two last of whom were infants.

James Sadler died in his wife's lifetime, and, after his death she married the defendant William Golding Mayhew; and there was issue of that marriage three children, all of whom were infants.

Elizabeth Mayhew, by her will dated the 15th of September 1831, after reciting the power of appointment given to her by the settlement, appointed the fund to her executor, in trust for her children by both marriages, equally, and directed that they should receive their respective shares at the age of twenty-five. And she declared that, in case any one of her children by her first husband should object or refuse to share the trust property with her children by her second husband, the child so refusing should not have any part of the trust property, and, in case all her children by her first husband should refuse, then she bequeathed the whole of the trust property to the plaintiff, her youngest child, by her first husband, except £1500, which she bequeathed to her daughter Albinia Sadler.

The bill, which was filed by H. H. Sadler, against his brothers and sisters by both marriages, prayed that the trusts of the settlement and of the will, so far as the same might, in the judgment of the court, be a valid appointment, might be carried into execution, and that the rights and interests of the plaintiff and of the defendants, might be ascertained and declared, and that the fund might be secured.

Mr. Knight and *Mr. Jacob* for the plaintiff, contended that, in case the previous provisions of the will failed, the plaintiff would be entitled to the whole of the trust-fund, subject to the payment of £1500 to his sister Albinia.

Mr. Pepys and *Mr. Monro*, for one of the children of the first marriage, said that the appointment was *wholly* void, and, therefore, the children of the first marriage would take as in default of appointment; but, if the appointment was valid in any respect, the condition annexed to it was clearly void, as being in fraud of the power, and, consequently, no right could arise through it, to the plaintiff. *Alexander* v. *Alexander*, 2 Vez. 640.

Mr. Temple, for another child of the first marriage, contended that the appointment was good as to the children of the first marriage, and void as to the children of the second marriage.

Sir E. Sugden and *Mr. G. Richards*, for the children of the second marriage, disclaimed all interest as appointees.

Mr. Tennant, *Mr. E. Montague*, and *Mr. Elderton*, appeared for the other parties.

The Vice-Chancellor said that the appointment to the four children of the first marriage was good, except as to the time of payment,

which was too remote; and that the appointment to the children of the second marriage, was void.

Declare that the defendants James H. C. Sadler, Albinia Sadler, William B. Sadler, and the plaintiff H. H. Sadler, are absolutely entitled to one seventh each of the trust-fund, under the will or testamentary appointment of Elizabeth Mayhew; and that the said will or testamentary appointment is void so far as the same purports to postpone the payment of such shares until the said several parties attain the age of twenty-five years; and that the said will or testamentary appointment is not an effectual appointment as to the other three seventh parts of the trust-fund; and that the defendants J. H. C. Sadler, Albinia Sadler and W. B. Sadler and the plaintiff, are entitled to such three seventh parts, under the trusts of the settlement, as being unappointed, and subject to all the trusts and provisions in the settlement contained.[1]

[1] "The next question is, Whether the whole being defective as to part should be totally set aside, and the fund be distributed as in default of appointment. It is contended, that if it cannot take effect in the manner the distribution was made by the testator's father, the question will be, what he would have done, if he had been apprised, that part failing, there would arise an inequality unforeseen by him as to his children. The answer is, nobody can tell what he would have done: but that is not a ground for setting aside the whole; for each child, to whom he has well appointed, has a right to claim that: for instance John Bristow, who has £2000. The court has no right to take that away. There is no reason to say to them 'you shall not take this, because the intention as to the rest cannot take effect.' There is no ground to rescind the gifts to them of their parts. I asked, whether there was any case, where the whole was set loose, and distributed, as if no appointment had been made, because part of the appointment was bad. That proposition therefore is untenable, that in case of a flaw in the execution as to part, the whole must be void. All that is well appointed, will stand.

"The consequence is, the remainder must be divided as in default of appointment; unless it will hold, as argued, and I do not know how to state it as to this case, that a person to whom a specific share is appointed, shall be excluded from taking any of the unappointed share, because it is clear, the father meant, he should have no more, than what was particularly given. The doctrine of election cannot apply, where there is no other subject but that to be appointed. It never can be applied, but where, if an election is made contrary to the will, the interest, that would pass by the will, can be laid hold of to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that, which he had power to distribute." — *Per* Lord Loughborough, C., in *Bristow* v. *Warde*, 2 Ves. Jr. 336, 350 (1794).

THORNTON *v.* BRIGHT.

CHANCERY. 1836.

[*Reported* 2 *Myl. & Cr.* 230.]

By the settlement made in contemplation of a marriage between Samuel Heywood, barrister-at-law, afterwards Serjeant Heywood, and Susannah Cornwall, afterwards Susannah Heywood, dated the 26th of December, 1780, and a common recovery duly suffered in pursuance thereof, the whole townland and hereditaments of Ballygrubane in the county of Armagh, in Ireland, were settled and assured (subject to life estates therein to the father and mother of Samuel Heywood) to the use of Samuel Heywood for life, with remainder to trustees to preserve, &c.; with remainder to the use of Susannah Cornwall his intended wife for life; with remainder to the use of all and every or such one or more of the child or children of the body of Samuel Heywood on the body of Susannah Cornwall to be begotten, whether male or female, for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, some or one of them, and in such manner and form, as Samuel Heywood, at any time or times during his life, by any deed or deeds, writing or writings, or by his last will and testament in writing, executed and attested as therein mentioned, should direct, limit, or appoint; and in default of such direction, limitation, or appointment, and as to such parts of the same estate whereof no such direction, limitation, or appointment should be made, to the use of the first and other sons of the marriage, successively, in tail male; with remainder to the use of the daughters of the marriage equally, as tenants in common, in tail general, with cross-remainders between them; and in case all such daughters but one should die without issue, or there should be but one such daughter, then to the use of such one surviving or only daughter and the heirs of her body, with the ultimate remainder to the use of Samuel Heywood, his heirs and assigns forever.

The settlement contained a covenant by the father of Susannah Cornwall that he would, within a month after the marriage, transfer into the names of the trustees of the settlement the sum of £300 per annum Bank Long annuities, upon certain trusts for the benefit of the intended husband and wife for their respective lives, and subject thereto, upon trust, as to £200 of such annuities, for all or such one or more of the children of the marriage, and in such shares and proportions, manner and form, and at such ages, as Susannah Cornwall should, if she survived her intended husband, as therein mentioned appoint; and as to the remaining £100 of such Long annuities, and also, in case the husband

should survive the wife, as to the said sum of £200 of such annuities, upon trust for all or such one or more of the children of the marriage, in such parts, shares, and proportions, and at such age or ages, and subject to such powers and limitations, such limitations to be for the benefit of the children, as the husband should by any deed or writing, or any last will and testament executed and attested as therein mentioned, direct or appoint; and in default of such direction or appointment, or as to so much of the said sums of £200 and £100 as should not be so directed or appointed, upon trust for all the children of the marriage equally, the shares of sons to vest and to be assigned to them at twenty-one, and of daughters at twenty-one or marriage, which should first happen, after the decease of the husband and wife; with benefit of survivorship and accruer with respect to the shares of such of the children as should die before they should have taken vested interests.

The marriage took effect; and, in pursuance of his covenant, John Cornwall, the father of Mrs. Samuel Heywood, thereupon transferred into the names of the trustees the sum of £300 per annum Long annuities, upon the trusts of the settlement. There were issue of the marriage several children, of whom three only, namely, Phœbe Augusta Heywood, Anne Heywood (afterwards the wife of William Granville Eliot), and Mary Isabella Heywood, lived to attain the age of twenty-one.

Under the will of John Cornwall, two several sums of £3000 and £2000 were afterwards laid out by the trustees in the purchase of Bank Long annuities, and held by them upon the same trusts as the £300 per annum like annuities originally settled; and the whole amount of the Bank Long annuities included in the settlement was thereby increased to the sum of £552 1*s.* 9*d.* per annum.

By indentures of settlement, dated the 4th and 5th of January 1815, and made in contemplation of a marriage between Anne Heywood, the daughter of Samuel Heywood, and William Granville Eliot, after reciting (among other things) that Anne Heywood was entitled, under the settlement of the 26th of December 1780, after the decease of Samuel Heywood and Susannah his wife, in case no appointment was made to the contrary, to a vested interest in one third share of £552 1*s.* 9*d.* per annum Bank Long annuities; and that she was also, by virtue of the said settlement and of a common recovery suffered in pursuance thereof, and of a certain deed poll of appointment dated the 3d of January 1815, and duly executed by Samuel Heywood in pursuance of his power contained in the settlement, from and after the decease of Samuel Heywood and Susannah his wife, entitled to her and her heirs forever, to one equal undivided third part of and in the townlands and hereditaments of Ballygrubane; and reciting that, upon the treaty for the intended marriage, it was agreed that such third part of the said hereditaments and premises should be conveyed, and the said one third of the Bank Long annuities assigned, to trustees, upon the trusts, and subject to the provisos, declarations, and agreements after mentioned;

she, Anne Heywood, with the privity and consent of her intended husband, thereby conveyed and assured to certain trustees therein named and their heirs, all that her undivided third part of and in the townland of Ballygrubane, to hold the same with the appurtenances unto the said trustees, their heirs, and assigns (subject nevertheless to the several life estates of Samuel Heywood and Susannah his wife therein) to the use, after the marriage, of William Granville Eliot and his assigns for life, without impeachment of waste; with remainder to trustees to preserve, &c.; with remainder to the use of Anne Heywood, his intended wife, for life; with remainder to the use of the children of the marriage, in such manner, and subject to such appointment as therein mentioned; and in default of appointment, to the use of the first and other sons of the marriage successively in tail male; with remainder to the daughters of the marriage equally as tenants in common in tail general; with cross-remainders amongst such daughters; with the ultimate remainder to the use of Samuel Heywood, his heirs and assigns forever. And Anne Heywood, with the like consent and approbation, thereby assigned to the same trustees, their executors, administrators, and assigns, all that her equal undivided third part of the sum of £552 1*s.* 9*d.* per annum Bank Long annuities, to hold the same upon trust (after the decease of the survivor of Samuel Heywood and Susannah his wife) to pay the dividends thereof to William Granville Eliot for his life, and after his death to pay the same to Anne Heywood; and after her death, to make over the same one third of the said funds and the dividends thereof to the children of the marriage in such manner and subject to such power of appointment as therein mentioned.

This settlement also contained a covenant by William Granville Eliot that in case Anne Heywood, or William Granville Eliot in her right, should, at any time during her coverture, become entitled, by survivorship or otherwise, to any further share or interest in the said townland and hereditaments, or any further sum in the Long annuities, or to any other money, estates, or effects, by virtue of any gift, bequest, or otherwise, of any of her relations or friends, exceeding the value of £50, he, William Granville Eliot, would, within a month after she or he in her right, should become so entitled, unless otherwise expressly ordered or appointed by the deed or will under which she should become entitled thereto, convey, assign, pay and make over the same to the trustees of the settlement for the time being; as to such part thereof as should be of the nature of real estate, to the several uses thereinbefore mentioned concerning the third part of the townland and hereditaments thereby granted and released; and, as to such part thereof as should be of the nature of personal estate, upon the several trusts therein expressed and declared concerning the Bank Long annuities thereby assigned. And Samuel Heywood, thereby, for himself and for Susannah his wife, covenanted with the trustees that neither he nor his wife would at any time in virtue of their respective powers, make any appointment of any part of the sum of £552 1*s.* 9*d.* Bank Long annu-

ities that should lessen or diminish the one third share thereof to which Anne Heywood was entitled, and thereinbefore assigned by her.

The marriage between William Granville Eliot and Anne Heywood was duly solemnized; and there were issue of the marriage two surviving children only, both of whom are infants. In the month of January 1822, Susannah Heywood died, and was survived by her husband, and their three daughters. Mary Isabella Heywood, one of those daughters, died in October 1822, unmarried and intestate, and her father, Serjeant Heywood, took out administration to her estate. The trustees of Serjeant Heywood's marriage settlement, conceiving that Mary Isabella Heywood, in default of appointment, took a vested interest in one third of the sum of £552 1*s.* 9*d.* per annum Bank Long annuities, subject to her father's life interest therein, shortly afterwards sold out that third (being £184 0*s.* 7*d.* per annum) and paid over the proceeds to Serjeant Heywood, as the administrator of his deceased daughter. The amount of the Long annuities standing in the names of the trustees was thus reduced to the sum of £368 1*s.* 2*d.* per annum.

On the 15th of June 1826, Serjeant Heywood made his will, which was executed and attested as required by the power contained in his marriage settlement. By that will, after reciting, among other things, that, by virtue of a deed poll, dated the 3d of January 1815, and executed in pursuance of the power contained in his marriage settlement, and by the settlement made on the marriage of his daughter Anne, one equal third of the townland of Ballygrubane had been settled and limited as therein mentioned, and that one third of the Bank Long annuities to which his said daughter was then presumptively entitled was assigned to her trustees upon the trusts therein mentioned; and further reciting the receipt by the testator of the proceeds of the sum of £184 0*s.* 7*d.* per annum Bank Long annuities, as administrator of his deceased daughter Mary Isabella, and that £184 0*s.* 7*d.* being one moiety of the remaining sum of £368 1*s.* 2*d.* per annum Bank Long annuities was, by virtue of his covenant in the marriage settlement of his daughter Anne, to be transferred, upon his decease, to the trustees of her settlement; and that he had a right to appoint the remainder of the Bank Long annuities, under the power reserved to him in his own marriage settlement; the testator, in pursuance and execution of that power, and of all other powers in him vested, directed and appointed the remaining two thirds of the estate of Ballygrubane, to the use of Richard Bright and Benjamin Heywood and their heirs, and also appointed to the same trustees, their executors, administrators, and assigns, the sum of £184 0*s.* 7*d.* Bank Long annuities, being the remaining third of such Long annuities, upon trust, out of the rents of the two thirds of Ballygrubane, and the dividends or income of the Long annuities, yearly to pay unto or for his daughter Phœbe Augusta Heywood, during her life, for her own use and benefit, such sums of money, not exceeding in any one year £300, as his trustees and his daughter Anne Eliot might think most for her advantage. And the testator directed that the

annual surplus, if any, of such rents and dividends should be paid to his daughter Anne Eliot for her separate use, free from the control of her then present or any future husband, during the joint lives of herself and Phœbe Augusta Heywood, and that her receipt alone, notwithstanding her coverture, should be a sufficient discharge to the trustees; and in case of the death of Anne Eliot, during the life of Phœbe Augusta Heywood, then such annual surplus was to be paid to such person or persons as should be the heir of the body of Anne Eliot for the time being. And after the decease of Phœbe Augusta Heywood, in case Anne Eliot and her then present husband should be then living, upon trust to pay the whole of the rents and profits of the two thirds of Ballygrubane into the proper hands of Anne Eliot, or such person or persons as she should by writing appoint, for her sole and separate use, and free from the control of her then present husband; and her receipt alone, notwithstanding her coverture, was to be a sufficient discharge to the trustees; but Anne Eliot was not to be at liberty to assign or appoint such rents and profits by anticipation, or before they became actually due. And in case Anne Eliot should survive her then present husband, then the testator, from and after his decease, and the decease of his daughter Phœbe Augusta Heywood, appointed the said two third parts of Ballygrubane to Anne Eliot and the heirs of her body. But in case Anne Eliot should die in the lifetime of her said husband and of Phœbe Augusta Heywood, the testator thereby willed that Anne Eliot should have full power to give or appoint, after the decease of Phœbe Augusta Heywood, the whole or any part of the two third parts of Ballygrubane to all or any one or more of her children who might survive her, for such estate and estates, upon and for such trusts, and in such manner and form as, notwithstanding her coverture, she, by her last will and testament in writing, or any codicil thereto, executed and attested as therein mentioned, should direct or appoint; and in default of such direction or appointment, then the testator directed and appointed the same unto the heirs of the body of Anne Eliot. And the testator thereby also directed that, from and after the decease of Phœbe Augusta Heywood, the income of the Bank Long annuities should be paid to Anne Eliot for her separate use, during the joint lives of herself and her then present husband; and in case she should survive her husband, that the capital of the Bank Long annuities should be transferred to her for her own use; but in case she should die in her husband's lifetime, then, after her decease, the trustees were directed to transfer the capital of such Long annuities to such person or persons and in such manner and form as Anne Eliot should, notwithstanding her coverture, by her last will and testament in writing, or any codicil, executed and attested as therein mentioned, appoint; and in default of such appointment, unto her executors or administrators as part of her personal estate. Richard Bright and Benjamin Heywood were appointed the executors of the will.

Serjeant Heywood died in the month of September 1828, leaving his

daughters Phœbe Augusta Heywood and Anne Eliot his co-heiresses at law and only next of kin. Phœbe Augusta Heywood died in the month of June 1832, unmarried and intestate, leaving Anne Eliot her heiress at law and only next of kin.

The bill was filed by the trustees of Serjeant Heywood's marriage settlement against the trustees and executors of the serjeant's will, (one of whom had also obtained letters of administration *de bonis non* of Mary Isabella Heywood) against Mr. and Mrs. Eliot, their infant children, and the trustees of their marriage settlement, and against the personal representative of Phœbe Augusta Heywood; and it prayed that the rights of the several parties in the property which formed the subject of the settlement of December 1780, might be ascertained and declared.

By the decree of the *Vice-Chancellor*, made at the hearing of the cause, it was, among other things, declared that the settlement of the 5th of January 1815, made on the marriage of William Granville Eliot and Anne Heywood, was a valid appointment of one third of the £552 1*s.* 9*d.* per annum Bank Long annuities; and that the one third of the sum of £552 1*s.* 9*d.* per annum Bank Long annuities, amounting to £184 0*s.* 7*d.* per annum like annuities sold out in the lifetime of Samuel Heywood, and the proceeds whereof were paid to him, was unappointed; and that one third of such last mentioned third vested in Anne Eliot, one other third in Phœbe Augusta Heywood, and the other third in Mary Isabella Heywood; and that Anne Eliot became entitled, as the next of kin of Phœbe Augusta Heywood to her said one third of a third, and that the two thirds of a third, to which Anne Eliot so became entitled, were liable to be settled under the covenants contained in her marriage settlement; and that under the appointment contained in the will of Samuel Heywood, Anne Heywood became absolutely entitled for her separate use to the remaining one third of the sum of £552 1*s.* 9*d.* per annum Bank Long annuities; and that she was not bound to settle the same. And it was further declared that the appointment contained in the will of Samuel Heywood, as to the two thirds of the real estate of Ballygrubane, to the trustees for the separate use of Anne Eliot, was invalid; but that the appointment of the same two thirds by that will to Anne Eliot in tail was a valid appointment; and that under the covenants contained in her marriage settlement, she was bound to settle the same to the several uses in the settlement expressed concerning the one third of the hereditaments and premises thereby granted and released; and that Anne Eliot should convey the same to the trustees of her marriage settlement, and settle the same accordingly; and that the trustees of Serjeant Heywood's will should pay to William Granville Eliot, as being entitled thereto under the settlement, a moiety of the rents received by them, and which became due after the decease of Samuel Heywood, and prior to the decease of Phœbe Augusta Heywood, in respect of the two undivided thirds of the said real estate, and also the entirety of the rents of the same two undivided

thirds which had accrued due, and had been received by them since the death of Phœbe Augusta Heywood.

The defendant Mrs. Eliot appealed against so much of the *Vice-Chancellor's* decree, as declared the appointment of two thirds of the estate of Ballygrubane to be void, and against the consequential directions.

The Solicitor-General and *Mr. Lovat*, in support of the appeal.

Mr. Jacob and *Mr. Norton*, in support of the decree.

Mr. Stevens and *Mr. Gresley*, appeared for other parties.

The Lord Chancellor [Cottenham]. The appeal in this case is confined to that part of the decree which declares that an appointment in the will of the late Serjeant Heywood of two thirds of an estate in Ireland, to trustees, for the separate use of the appellant, Mrs. Eliot, was invalid, and that she was under the covenant in her settlement bound to settle the same to the uses contained in that settlement as to the other one third, and which directs her to convey the same accordingly, and directs payment to her husband of the rents of such two thirds: the appellant contending that the will of Serjeant Heywood ought to take effect so as to secure to her, for her separate use, the rents of the two thirds in question; and that she is entitled to the two thirds of the estate under the serjeant's appointment by his will, and is not bound to settle it upon the trusts of her marriage settlement.

[His Lordship here stated the limitations contained in Serjeant Heywood's marriage settlement, and continued: —]

The power was to be exercised in favor of all or any of the children, for such estate and estates, charged with such annual or gross sums in favor of children, and in such manner and form as the serjeant might appoint; and then follow limitations in default of appointment, under which, in the events which have happened, the estate has devolved upon Mrs. Eliot in tail. Of this marriage there were issue but three daughters who survived childhood and attained twenty-one; Mary Isabella, who died, before the serjeant's will, unmarried; Phœbe Augusta, who also died unmarried, but after the serjeant; and Anne, now Mrs. Eliot, who has children.

Preparatory to the marriage of Mrs. Eliot, Serjeant Heywood appointed one third of the estate in question to her in fee; and by her marriage settlement, dated the 5th of January 1815, this third was conveyed to trustees in fee, to the use (subject to the life estates of Serjeant Heywood and his wife) of Mr. Eliot for life, remainder to Mrs. Eliot for life, remainder to the use of the children of the marriage as therein provided. In this settlement there was the following covenant by Mr. Eliot. [His Lordship read the covenant.] The subject upon which this covenant is to operate is any other interest in the estate in question to which Mrs. Eliot might become entitled by survivorship or otherwise; but the covenant is not to operate, if the property be otherwise expressly directed or appointed by the deed or will by virtue of which she shall become entitled thereto.

Serjeant Heywood, by his will, dated the 15th of June 1826, executed and attested as was required by the power reserved in the settlement of 1780, (after reciting that one third of the estate had been limited by the settlement of the 5th of January 1815,) in pursuance of the power reserved in his own marriage settlement, and in execution thereof, directed and appointed as follows. [His Lordship here stated the material part of the will.]

It is admitted that the testator had no power to make the provision intended by his will for the children of Mrs. Eliot. Independently of such provision, what the testator has attempted to do is to appoint the two thirds of the real estate to trustees, for an interest which was to continue during the life of his daughter Phœbe Augusta, and the joint lives of his daughter Anne and her husband, upon trust, to pay £300 a year for Phœbe, and the residue of the rents, and after Phœbe's death the whole, for the separate use of Anne; and if Anne should survive her husband, then after his death and the death of Phœbe, he appointed the two thirds of the estate to Anne and the heirs of her body. The testator, then, in the event of Anne dying in the lifetime of her husband and of Phœbe Augusta, attempts to give to Anne a power of appointment to her children; and in default thereof, and as to so much whereof no complete appointment should be made, he appointed the same to the heirs of the body of his daughter Anne.

It is to be observed that the estate tail given to Anne is contingent upon her surviving her husband; and the gift to the heirs of the body of Anne is contingent upon her dying before her husband and Phœbe Augusta, and not making an appointment in favor of her children.

[His Lordship then stated the substance of the decree.]

The effect of this decree is to declare that the testator had no power to direct the payment of the rents to his daughter Anne for her separate use, and to treat the appointment as creating a valid estate tail, inasmuch as it directs her to convey the two thirds to the trustees of her own settlement under the covenant, although the estate tail was given only in the event of Anne surviving her husband, who is still alive, and although the covenant in her settlement was by the husband only, and was to operate only in the event of the instrument under which she might become entitled to the property not directing otherwise. The effect of the decree is to give to the husband an estate for life in his own right, contrary to the express directions of Serjeant Heywood's will, and unless she should survive her husband, to deprive the wife of all benefit from the property, and if she should survive him, to give her only a life estate, although, in that event, the testator gave her an estate tail.

The first question to be considered is whether Serjeant Heywood was authorized by his own settlement to appoint the rents of the two thirds of the estate to the separate use of his daughter Anne; because, if he was, the question whether such interest as she took under his will was, or was not, subject to the covenant in her own settlement, will not arise.

Now, his power is to appoint in favor of children for such estate and estates, charged with such annual or gross sums, and in such manner and form as he should think fit. As to so much of and such interest in the estate as Serjeant Heywood should not effectually appoint, Mrs. Eliot, in the events which have happened, would, by the provisions of the settlement of 1780, be entitled in tail. It is said that what Serjeant Heywood has attempted to do, by way of appointment, in the event of Mrs. Eliot dying in the lifetime of her husband and sister, namely, to give her a power of appointing amongst her children, and, in default of her so appointing, to give the estate to the heirs of her body, is not within the power, and therefore void. But he has also appointed the rents of the estate, during the joint lives of herself and her husband, to trustees for her separate use, and the estate itself to her in tail, if she should survive her husband; and the decree declares that his appointment to her in tail is valid; but that the appointment of the rents for her separate use is invalid; and the decree directs Mrs. Eliot so to deal with this estate tail as to settle it according to the covenant in her own settlement. Now it is to be observed, that if the appointment of the rents to her separate use, and of the estate, in the event of her dying in her husband's lifetime, be invalid, Mrs. Eliot is entitled to an immediate estate tail under the settlement of 1780; but the estate tail, under the appointment in the will of Serjeant Heywood, is made to depend upon her surviving her husband, who is still alive; and, therefore, it does not appear how such an estate can be made subject to the covenant in her settlement, even supposing the object of that settlement to be to give interests to the husband, and not to protect the wife against the exercise of his marital rights.

It has not been disputed at the bar, and the decree affirms, that the appointment of the estate tail is good; but if it be good, it must prevail according to the terms and conditions of the appointment, namely, to take effect after the termination of the joint lives of Mr. and Mrs. Eliot, and in the event only of Mrs. Eliot surviving her husband.

Serjeant Heywood, in exercising this power, has given to his daughter the rents for her separate use, during the joint lives of herself and her husband, and, if she survive him, then the estate, in tail; the obvious object being to protect his daughter against the marital power of her husband, and to exclude the husband from any participation in the benefit of that property. The decree, however, wholly defeats this object in two ways. It declares the gift of the rents for the separate use of Mrs. Eliot to be invalid; and it treats the estate tail, under the appointment, which it declares to be good, as a present interest; and it gives to the husband the same benefits in the two thirds of the estate as he had under his own settlement in the one third. The terms of the power are as large as they can well be: — "for such estate and estates, and in such parts, shares, and proportions, and with such limitations over, and charged with such annual or gross sums, such limitations over and charges to be to or for the benefit of the same children, and in such

manner and form," as Serjeant Heywood should, at any time or times, direct, limit, or appoint. What is there to prevent the donee of such a power from directing the rents of the estate, the subject of the power, to be paid to a married daughter, during the joint lives of her and her husband, and, if she survive her husband, the estate itself to her in tail?

In support of the decree it was first contended that the words "in such manner and form" applied only to the charges to be created, and the limitations over to be made, under the power; but this is clearly contrary to the meaning of the clause; the copulatives run through the whole of it, and every limb of it is part of the whole body, — "for such estates, *and* in such parts, *and* with such limitations, *and* charged with such sums, *and* in such manner and form."

It was contended, secondly, that under such a power the donee could only appoint so as to create legal estates. Could he then, in executing the power to charge, create only a legal rent charge? and what do the words "in such manner and form" imply? The argument assumes that under such a power the donee could not, for any purpose, create a trust. It was said, indeed, that a court of equity would not interfere to carry such intention into effect. But the court interposes only as it does to enforce the execution of all other trusts; the appointment creating a legal estate in trustees during Mrs. Eliot's life; and the argument was necessarily confined to appointments of which the subject is a legal estate in land; this very decree giving effect to a precisely similar appointment over a sum of stock. The objection, therefore, is not that the appointment is not within the terms of the power, but that such a power, to be exercised over land, including the legal estate as well as the beneficial interest, must be confined to creating a legal estate and cannot create a trust. This must depend upon the terms of the power, and the intention by those terms expressed; for, undoubtedly, every mode of dealing with an estate may be effected through the means of a power which could be exercised by the original authors of the power.

All this reasoning, however, must yield to the weight of authority, if the point has been established by authority. *Alexander* v. *Alexander*, 2 Ves. Sen. 640, was cited for the appellant; and that case establishes that, under a power to appoint a personal fund in such proportion as the donee should direct, an appointment to one of the objects for life, to her separate use, was good. So far it is a strong authority for the appellant; but the respondent contended that another part of that case was in his favor, that is to say, the part which related to the share of Francis. Now, as to Francis's share, the case was this: — the donee having power to appoint amongst children, gave, contingently, a part of the fund to two of the children, to apply it at their discretion for the benefit of another child, namely, Francis, his wife, and children. This was clearly bad on two grounds. It was a delegation of the power, and was to be exercised in favor of the wife and children, who were not objects of the power. The decision upon this point cannot possibly aid the argument of the respondent.

The respondent's counsel also attempted to draw an argument from *Hervey* v. *Hervey*, 1 Atk. 561, which, they contended, established the proposition, that a power to appoint in favor of a particular person cannot be executed by an appointment to trustees for such person. In that case there was in a settlement a power to a father to make a jointure to the amount of £600, interposed between his own legal estate for life and a legal remainder to his son; and he attempted to execute the power by appointing the estate to trustees, upon trust, to pay £600 a year to his wife. Lord Hardwicke held that a power to jointure was a power to create a legal estate, and was not well executed by creating a trust; but he, nevertheless, considered the wife as entitled to her jointure, and decreed accordingly. That is no authority to show that such a power as is found in this case cannot be executed by creating a trust; but it does prove, that where there was at law a failure in the execution of the power, this court gave to the object of it, being a wife, the full benefit of it. The report of *Churchman* v. *Harvey*, Amb. 335, establishes the same principle. No other cases were relied upon for the respondent. Several were cited for the appellant, in which, under such a power of appointment as in the present case, over a fund of personalty, an appointment for the separate use of a married daughter had been held good. To that class belong cases like *Alexander* v. *Alexander* and *Madison* v. *Andrew*, 1 Ves. Sen. 58, upon which it is not, however, necessary to observe particularly; the decree in this very case establishing the proposition as to the one third of the Long annuities.

It was contended, however, that the rule does not apply to lands, at least when the subject of the power is a legal estate in lands. No case, as I have already stated, was cited in support of this proposition. Against it there are several. The first of these is *Pitt* v. *Jackson*, 2 Bro. C. C. 51, where a sum of money was covenanted to be laid out in land, to be settled upon the husband for life, remainder to the wife for life, remainder to the children in such shares, for such estates, and subject to such powers, limitations, and provisos as the husband should appoint. Real estates were purchased with the trust fund: but the husband, by his will, directed that £10,000, which he considered to be part of the trust fund, should be laid out in land, to be conveyed to a daughter of the marriage for life, for her separate use, with remainder to her children in tail. The cause was first heard by Lord Kenyon, then Master of the Rolls, sitting for the Lord Chancellor, when it was decreed that as to this sum of £10,000, it should be laid out in land, to be settled to the use of trustees for the daughter and the heirs of her body; but that the profits should be paid for her separate use. The cause was afterwards reheard by Lord Rosslyn upon a bill of review, under the name of *Smith* v. *Lord Camelford*, 2 Ves. Jun. 698, when his Lordship decided that the appointment did not operate upon the land purchased, the husband having intended to appoint the fund; nor upon the fund, because it had ceased to exist, being invested in the land. The judgment of the Master of the Rolls, however, with respect

to the effect of the appointment of the £10,000, if there had been a proper subject-matter upon which the appointment could operate, is not affected by the decision of Lord Rosslyn. On the contrary, Lord Rosslyn (2 Ves. Jun. pp. 711, 712) expresses an opinion in favor of Lord Kenyon's judgment upon this point.

The case of *Pitt* v. *Jackson* is admitted to be an authority for the appellant; but its weight is attempted to be lessened by a statement, that the same counsel appeared for the husband and the wife. In *Crompe* v. *Barrow*, 4 Ves. 681, the subject of the power was leasehold property in trust. It is, however, an authority, that an appointment to the separate use of a married woman is a good appointment under a less extensive power than this. In *Kenworthy* v. *Bate*, 6 Ves. 793, the power was over a legal estate in land; the settlement being to the use of the husband for life, remainder to the wife for life, remainder to such children of the marriage as their father should by will direct and appoint. The father, by his will, directed that the estate should be sold and the proceeds divided among the children; and this appointment was supported, upon the authority of *Long* v. *Long*, 5 Ves. 445; *Thwaytes* v. *Dye*, 2 Vern. 80; and *Roberts* v. *Dixall*, 2 Eq. Ca. Ab. 668, pl. 19, and 1 Atk. 607. How then can it be contended, that such a power as this over a legal estate in lands can only be executed by creating legal estates? If the contrary be the law, where then is the difference between such appointments over personalty and over land; and what is the ground of the difference which this decree establishes? The cases of *Bennet* v. *Davis*, 2 P. Wms. 316, and *Doe* v. *Martin*, 4 T. R. 64, were cited for the appellant, to prove, that if there were any objection in the appointment to trustees, the wife's right would be the same in equity; but in my view of the case, it is not necessary to resort to that ground.

It was lastly contended for the respondent, that supposing the appointment for the separate use of Mrs. Eliot to be good, she was bound by the covenant to devest herself of it, and to settle the estate according to the terms of her own settlement, which would have the effect of giving to her husband an estate for life, and so defeat the object of the appointment. To this argument, however, there are three answers: — 1st, that the covenant is the husband's only, and applies only to that over which he might have dominion; 2dly, that it does not apply to property, as to which any express order or direction was given inconsistent with the purposes of the settlement; and, 3dly, that the decree in this cause concludes this argument, because the one-third of the long annuities would be as much within the terms of the covenant as the two-thirds of the real estate.

Upon the whole, therefore, after paying every attention to the argument in favor of the decree, and with the utmost respect for the authority from whence it proceeded, I cannot come to the opinion, that this appointment for the separate use of Mrs. Eliot is void.

The result is, that I must reverse so much of the decree as declares

the appointment to be invalid, and directs the conveyance to the uses of Mrs. Eliot's settlement, and as directs payment of the rents according to the declaration; and in lieu of that part of the decree, I must declare this appointment to be good, and direct the trustees to pay the rents to the separate use of Mrs. Eliot during the joint lives of herself and her husband.

There being no conveyance at present to be executed, it does not seem proper to make any further declaration as to the ulterior interests in the property.[1]

IN RE BROWN'S TRUST.

CHANCERY. 1865.

[*Reported L. R.* 1 *Eq.* 74.]

UNDER the marriage settlement of a Mr. and Mrs. Brown, dated in 1840, a fund was limited, after the death of the survivor of husband and wife, upon trust for "all and every the children, or child, or more remote issue" of the marriage, "in such shares and proportions, or for any one or more of such children or other issue exclusively of the others or other of them, at such age or ages, time or times, and subject to such conditions, restrictions, charges, provisions, and limitations over for the benefit of or relating to some or one of the said children or more remote issue, and with such provisions for maintenance, education, and advancement" as the wife "at any time or times during her life, by any deed or deeds, with or without power of revocation and new appointment," or by her last will, should direct or appoint; and "for want of such direction or appointment, or so far as no such direction or appointment should extend," upon trust for all and every the children and child of the marriage who, being a son, should attain twenty-one, or a daughter should attain twenty-one, or marry with consent.

There was issue of the marriage one child only, William Henry Brown, who had attained twenty-one.

Mrs. Brown survived her husband, and married Henry Pritty.

Mrs. Pritty died on the 20th of October, 1864, having by will, "in exercise and execution of the power" given or reserved to her by the settlement, directed and appointed that from and after her decease the trust funds should be in trust for three persons whom she named upon trust to sell and invest as therein particularly mentioned, with power to vary securities, and to pay the interest dividends and annual income to William Henry Brown "during his life, or until he should become outlawed, or be declared a bankrupt, or should assign or encumber, or attempt to assign, charge, or encumber the income, or

[1] Cf. *Busk* v. *Aldam*, L. R. 19 Eq. 16 (1874).

until the same, or some part thereof, through his act or default, or by act or process of law, or otherwise, if belonging to him absolutely, become possessed in or payable to some other person or persons;" and from and after the determination of the trust thereinbefore declared for the benefit of the said William Henry Brown, if the same should determine in his lifetime, then, upon trust thenceforth during his life, to pay the income "for the maintenance, education, support, or otherwise, for the benefit of the said William Henry Brown, his wife and children, or any of them, at such time or times, in such proportions, and generally in such manner as the said trustees or trustee for the time being should think expedient;" and, upon trust, to accumulate the surplus; and, from and after the death of the said William Henry Brown, should stand possessed of the trust funds and accumulations, and the interest thereof in trust for the child, if but one, or all the children, if more than one, of the said William Henry Brown, who, being a male or males, should attain twenty-one, or being a female or females, should attain that age, or marry, equally to be divided between them, if more than one.

On the 19th of October, 1865, William Henry Brown assigned his interest.

There was no question as to the appointment by Mrs. Pritty being in excess of the power; and the only doubt that was entertained was, whether the appointment was altogether void, or void only for the excess.

The petitioners were William Henry Brown and his assignee.

Mr. Rolt, Q.C., and *Mr. Rendall*, for the petitioners, submitted the question to the court.

Mr. Springall Thompson, for the trustees of the settlement.

Mr. Amphlett, Q. C., for the trustees who were appointed under Mrs. Pritty's will.

Sir W. Page Wood, V. C. I think this case is quite clear. It is obvious that as to some of the objects of it, the appointment is in excess of the power; as to others it may be within it; but as I cannot possibly define the class which may fall within the power, and those which must be without it, I cannot make any distinction, and I must therefore hold that the whole gift fails.

Mr. Amphlett, Q. C., asked for the costs of proving Mrs. Pritty's will.

The Vice-Chancellor. I cannot give you the costs of proving the will. All the other costs will come out of the fund.[1]

[1] See also *Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713 (1848), p. 188 *ante*.

As to the effect of appointments with qualifying clauses not authorized by the power, and also as to the doctrine of *cy pres*, see the next chapter, on the Rule against Perpetuities.

SECTION IX.

DEFECTIVE EXECUTION.

SMITH *v.* ASHTON.

CHANCERY. 1675.

[*Reported* 1 *Ch. Ca.* 263.]

J. S. SEISED of lands in two counties, conveyed part to the use of himself for life, with remainder, and power to charge the lands so conveyed, with £500 by deed or will in writing under his hand and seal. This conveyance was voluntary, and without valuable consideration, and after by his last will in writing, not sealed, devised the £500 to his younger children, in whose right the bill is exhibited against his son and heir to have the £500. (a)

Against which the counsel for the defendant insisted, that the law was against the plaintiff; and both parties claiming under a voluntary settlement, and the same consideration, (viz.) natural affection, therefore he that hath the law on his side ought not to be charged to the younger children.

THE LORD KEEPER took time to deliberate, and now decreed the £500 though the will was not under seal, and the power not legally pursued. He cited *Prince and Chandler's Case*, decreed by the Lord Egerton, where there was a power to make leases on a covenant to stand seised to uses, on consideration of natural affection, and the lease was for provision for younger children.

Decreed good against the heir, for two reasons, 1st, for that the law was not then adjudged in *Mildmay's Case*. 2d. Because the son did claim by the same conveyance by which the power was limited. So 17 June, 8 Car. the jointure of the Countess of Oxford decreed good, where the power was not pursued; yet only part of her jointure depended on the question.

For he that reserveth such a power under circumstances, they are but cautions that another might not be imposed, or made without him. The substantial part is to do the thing, and therefore where it is clear and indubitable, the neglect of the circumstances shall not avoid the act in equity; possibly when from home or sick he remembered not the circumstance of his power; and the powers of this kind have a favorable construction in law, and not resembled to conditions, which are strictly expounded; for a power of this kind may be executed by part, and extinct in part, and stand for the rest; but a purchaser shall defend himself in such case, but with difference, though not executed according to the circumstances; for if he hath notice (*quære* if he

meant of the original conveyance only, or of the ill executed estate) he purchaseth at his own peril.[1]

[1] The circumstances under which equity supplies a defect in the execution of a power are the same as those under which it supplies the want of the surrender of a copyhold to the uses of the will. The subjoined cases are therefore in point on the subject of this section.

KETTLE *v.* TOWNSEND, 1 Salk. 187. "One devises a copyhold-estate to his grandson; and SOMMERS, LORD CHANCELLOR, decreed the will good, and that equity ought to supply a surrender as well as in case of a son; that a grandson was a son, and the grandfather was bound to provide for him. But the House of Lords reversed this decree, and held, equity ought not to supply such a defect in disfavor of the heir at law, unless it were in favor of a son or a daughter; and not then neither, if it was to disinherit the eldest son; but it was not material that such a son was provided for before, nor how far, for the father only is best judge whether he has fully advanced his child, or not."

Followed by *Perry* v. *Whitehead*, 6 Ves. 544 (1801); but see *Hills* v. *Downton*, 5 Ves. 557, 565 (1800).

FURSAKER *v.* ROBINSON, *In Chancery*, 1 Eq. Cas. Ab. 123, pl. 9 (1717). "A man seised of lands, which by the custom of the manor could only pass by deeds, surrender and admittance, and having a natural daughter, does by deed, in consideration of £300 therein mentioned to be paid by the said daughter, grant and convey those lands to her and her heirs; and she was admitted accordingly; but no surrender was made of those lands, as the custom required; and at the foot of the admittance was a proviso, that her reputed father should hold and enjoy those lands for his life; also in the deed was a covenant for farther assurance; no money was proved to be paid by her; and it being agreed that this conveyance was defective for want of a surrender; the question was, whether equity could supply it in favor of a natural daughter; and it was held [by LORD COWPER, C.], that it could not, that though her father might be obliged by the law of nature to provide for her, yet here she was to be considered as a mere stranger to him; that though the father might have a great affection for her, yet that was no such affection as would raise an use at law; that the covenant for farther assurance being only auxiliary, and depending on the original conveyance, if that were void, the covenant must be void or repugnant; and decreed accordingly."

TUDOR *v.* ANSON, *In Chancery*, 2 Ves. Sr. 582 (1754). "At the hearing 22 July last, the defect of surrender of the copyhold to the uses of the will was directed to be supplied in favor of the widow and children; the court declaring it need not be said they were unprovided, for the father was a judge of that: but that a grandson or natural child has been held not within the rule, and *a fortiori* a cousin of the testator is not.

"A petition was presented by the creditors to rectify the minutes by extending the direction to them; the will being introduced with these general words, 'I will, that all my just debts and funeral expenses be paid and satisfied.' The testator left no other real estate; and therefore the general devise will carry the copyhold; and be a charge for payment of debts in aid of the personal estate, 1 Ver. 411; 2 Ver. 229, 708; and *Lord Warrington's Case*; and *Colley* v. *Mickleston*, 20 May last, where the words were, 'I will, that my debts and funeral expenses be first paid and discharged,' and then followed particular distinct devises of his real estate.

"This was not opposed, it being the intention of the court at the hearing; and LORD CHANCELLOR [HARDWICKE] ordered the defect of surrender to be supplied for benefit of creditors, if the personal estate proved not sufficient."

FIELDING *v.* WINWOOD, *In Chancery*, 16 Ves. 90 (1809). "In the year 1767 Edward Pinches and Sarah, his wife, were admitted to certain copyhold premises, held of the manor of Hampton Court, to the use of them during their lives and the life of

CLIFFORD *v.* CLIFFORD.

CHANCERY. 1700.

[*Reported* 2 *Vern.* 379.]

THE Lord Clifford by marriage-settlement, was made tenant for life, of several manors and lands in Ireland, with power to make a jointure not exceeding £1000 per ann. upon his marriage with the Lord Berkeley's

the survivor; and after the decease of the survivor to the use of the heirs and assigns of Edward Pinches forever.

"Edward Pinches by his will, dated the 18th of March, 1776, gave and devised to his said wife all his freehold and copyhold estates of what nature or kind soever, to hold to her, her heirs and assigns forever; subject to an annuity of £2 to be paid to the testator's sister Ann for life.

"Sarah Pinches, the widow, by her will, dated the 2d of September, 1805, gave the said copyhold estate (describing it), with all her household furniture and other property whatsoever, to the plaintiffs, her nephew and niece, as tenants in common. Sarah Pinches died in January, 1806. Edward Pinches had not surrendered the copyhold estates to the use of his will, the legal estate in which therefore descended to his two sisters, Ann Pinches and Hannah Winwood, as his customary heirs.

"The bill was filed against Elizabeth Winwood, to whom the legal estate in those copyholds had descended; praying, that the defendant may be decreed to surrender to the use of the plaintiffs, as tenants in common.

"The answer denied the title of the plaintiffs, or that Sarah Pinches, if living, would have been entitled, to have the surrender supplied; stating, that at the death of her husband she was entitled to an estate for her life in the copyhold premises under the surrender, stated in the bill; and that she was also entitled to an annuity of £30 during her life, reserved by Edward Pinches upon a sale of freehold estates, as a part of the consideration; and, that at the death of Edward Pinches his sisters derived their principal support from their labor.

"*Mr. Leach* and *Mr. Daniel*, for the plaintiffs.

"*Mr. Alexander*, *Mr. Hollist*, and *Mr. Roupell*, for the defendants.

"THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] Upon looking into the cases I find, that the difference of opinion between Lord Rosslyn and Lord Alvanley is reduced merely to this: whether a surrender is to be supplied for the wife against an heir, unprovided for, when that heir is the son of the devisor. It is agreed by both of them, that upon the later decisions it is immaterial, how amply or how scanty the provision for the wife may be. Lord Alvanley, in the case of *Chapman* v. *Gibson* [3 B. C. C. 229], admits in effect, that a collateral heir has no right to resist the wife's equity; stating, that the argument, that the heir was unprovided for, was in that case not material; 'for according to the cases a wife has a right, where there is not an equal moral obligation violated by giving her relief.'

"Clearly there is not the same obligation to make a provision for a collateral heir as for a wife or children. In the case of *Hills* v. *Downton* [5 Ves. 557] Lord Rosslyn seems to question even that limitation upon the equity of the wife; and that distinction in favor of the heir, being a child of the devisor; and his Lordship seems to be of opinion, that the court ought never to enter into the consideration of the heir being or not being unprovided for. It was unnecessary there to decide that point; as the heir was provided for. Upon another ground it is unnecessary here to decide it; as this is the case, not of a son, but of a collateral heir; and it seems settled, that in such a case the wife's equity is not to be resisted."

See also *Smith* v. *Baker*, 1 Atk. 385 (1737); *Hawkins* v. *Leigh*, Ib. 387 (1734); *Rodgers* v. *Marshall*, 17 Ves. 294 (1809); Sugden Pow. (8th ed.) 530–548.

daughter, he covenanted to settle a jointure on her of £1000 per ann., and pursuant thereunto, a settlement was made, and a particular of lands mentioned, and set out for the jointure, and which in the particular given him, were computed at £1000 per ann., but in truth fell short, and were not above £600 per ann., the bill was to have the jointure made up £1000 per ann.

It was insisted for the defendant, that he claimed under the marriage-settlement as a purchaser, and the late Lord Clifford had only a power to have charged the estate with £1000 per ann. if he had not done it at all, and had died without executing of his power, a court of equity could not have done it for him, and have raised a jointure of £1000 per ann. upon the estate, though it had been reasonable and just for him to have done it in his life-time. So if he had executed his power but in part, that cannot be extended or carried further in equity. If tenant in tail covenants to make a jointure, although he might have done it by a fine or *common recovery*, a court of equity cannot relieve, or decree a jointure.

But the COURT in this case decreed the jointure to be made up £1000 per ann. against the issue in tail, who was not privy to the marriage-treaty, nor guilty of any fraud.[1]

FOTHERGILL *v.* FOTHERGILL.

CHANCERY. 1702.

[*Reported* 1 *Eq. Cas. Ab.* 222, *pl.* 9.]

J. S. MADE a settlement on his eldest son for life, with remainder to his first and other sons in tail, remainder over, with power for his son to appoint any of the lands not exceeding £100 per annum to any wife he should afterwards marry, for a jointure (the father being under an apprehension that he was then married to a woman which the father disliked, and had no intention his son should provide for); the father died, and the son married that woman (though there was strong presumptive proof that he was married to her before), and after marriage appointed certain lands to trustees, in trust for her, for a jointure, and covenants, that if they were not of £100 per annum value, that upon request made to him, any time during his life, he would make them up so much out of other lands in his power; he lived several years, and no complaint was made, that the lands were not of that value, nor request to make it up, and died without issue. On a bill brought by the widow to have the jointure made up £100, my LORD KEEPER [SIR NATHAN WRIGHT] said, that a provision for a wife or children was not

[1] See *Jackson* v. *Jackson*, 4 B. C. C. 462 (1793); *Shannon* v. *Bradstreet*, 1 Sch. & L. 52 (1803).

to be considered as a voluntary covenant, and therefore decreed the deficiency to be made up, notwithstanding the circumstances of the case, and her neglect in not requesting it during coverture, for the laches of a *feme* cannot be imputed to her.[1]

PIGGOT *v.* PENRICE.

CHANCERY. 1717.

[*Reported Prec. Ch.* 471.]

THIS was an appeal from the Rolls; and the only two points in question were: [The statement of the first point, and the opinion of the court thereon, are omitted.]

The second point was, where the testatrix had made a settlement, with power of revocation by writing, executed under hand and seal, in the presence of three witnesses, not being menial servants; and some time after, being indisposed, wrote a letter, which was proved and read in the cause, signifying her intentions to revoke those uses, and desiring a deed might be prepared pursuant to her power for revocation thereof, and settling the same on her niece Gore, whether this should amount to a revocation, she dying before any deed was prepared, or any revocation actually made?

But my LORD CHANCELLOR [COWPER] was so clear of opinion in both points against them, that he affirmed the decree, without hearing the counsel on the other side:

As to the second point, there might be good reasons for putting herself under that restraint, in the manner of revocation, to prevent surprise or inadvertency; that here was no pretence of any obstruction from the persons, who claimed under that settlement; that here was nothing more than bespeaking a revocation, and the completion of it prevented by her death; that no case had ever yet gone so far, and therefore it was too hard for him, and affirmed the decree.[2]

Note. — The testatrix by will gave part of these lands to charitable uses, and they were decreed at the Rolls to be good as an appointment upon the Act of Parliament, notwithstanding there was no revocation; but that point was not now brought in question.

[1] A husband is not entitled to have a defect in the execution of a power supplied in his favor. *Moodie* v. *Reid*, 1 Mad. 516 (1816).

[2] S. C. Comyns, 250.

TOLLET *v.* TOLLET.

CHANCERY. 1728.

[*Reported* 2 *P. Wms.* 489.]

THE husband by virtue of a settlement made upon him by an ancestor, was tenant for life, with remainder to his first, &c. son in tail male, with a power to the husband to make a jointure on his wife *by deed under his hand and seal.*

The husband having a wife, for whom he had made no provision, and being in the Isle of Man, by his last *will under his hand and seal*, devised part of his lands within his power to his wife for her life.

Object. This conveyance being by a *will*, is not warranted by the power which directs that it should be by *deed*, and a will is a voluntary conveyance, and therefore not to be aided in a court of equity.

MASTER OF THE ROLLS. [SIR JOSEPH JEKYLL.] This is a provision for a wife who had none before, and within the same reason as a provision for a child not before provided for; and as a court of equity would, had this been the case of a copyhold devised, have supplied the want of a surrender, so where there is a defective execution of the power, be it either for payment of debts or provision for a wife, or children unprovided for, I shall equally supply any defect of this nature: the difference betwixt a *non-execution* and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself.

And in this case, the legal estate being in trustees, they were decreed to convey an estate to the widow for life in the lands devised to her by her husband's will.[1]

[1] So where a father had a power to make provision for his children by deed, and he made it by will for children before provided for, equity aided the defect. *Sneed* v. *Sneed*, Ambl. 64 (1747).

WILKES *v.* HOLMES.

CHANCERY. 1752.

[*Reported* 9 *Mod.* 485.]

IN a marriage-settlement, after a limitation to the issue of the marriage, and of a jointure to the wife, a power was given to the husband and wife to raise two thousand pounds out of certain lands therein mentioned; and if no part, or only part, of that sum should be raised in the life-time of the husband and wife, then that it should be lawful for the survivor of them, by his or her last will or testament in writing, *duly* executed, to raise two thousand pounds only for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for the children of the marriage, except an eldest son. The husband died without executing the power. The wife executed it by a will signed in the presence of only two witnesses.

HARDWICKE, LORD CHANCELLOR, made two points: First, whether this was a due execution of the power. Secondly, whether, if it was not, the defect might be supplied by a court of equity.

As to the first, his Lordship observed, that since the Statute of Frauds no wills relating to lands can properly be said to be duly executed, unless it be in presence of three witnesses; and that to determine otherwise in this court would be a dangerous innovation; that though the will prescribed by the author of the power is a creature of his own, and the execution of it in the presence of two witnesses might have been good if he had thought fit to have ordered it so, yet as he has expressly directed that it shall be executed *duly*, he must be understood to have referred to some known rule, which, as he himself has mentioned none, can be construed to be no other than the rule of law; and that the Statute of Frauds has furnished us with.

As to the second point his Lordship had great doubt, and said, there was much difference betwixt defective deeds and instruments *inter vivos* and defective wills: that the former might in many instances be aided where the latter could not.

But afterwards he was of opinion, that the defect in this case might be supplied. He said, where a will is to operate by way of appointment, it takes no effect from the Statute, though the rules prescribed by the Statute may, as in this case, be arbitrarily inserted by the party; and that the appointee cannot claim under the will, but by the deed of settlement directing the execution of the power; which deed, together with the instrument executing the power, make in effect but one in raising the charge upon the land; but that in point of law the charge is created by the deed directing the execution of the power: to which purpose is the argument of Mr. Justice Powell in *Scatterwood* v. *Edge*. But to bring the matter still nearer this case: If instead of the power

to charge the lands with this sum of money, it had been to create a term for this purpose, the party claiming the benefit of the term, if his right had been disputed, must have pleaded the deed creating the power; so that the whole of this case must be taken on the deed and the power together. And the Statute of Frauds is entirely out of the question, except so far as it is the rule which the appointee is directed to follow in the execution of the power. It is objected, that at law as well as in equity a power relating to lands to be executed by will must be executed by a will pursuant to the Statute. This is true. So if a power is to be executed by deed, and there be any defect in this deed, it must fall to the ground. But this is to be understood only where the power is executed voluntarily: for if there be any meritorious consideration, as the payment of debts, or a provision for younger children, this court will interpose, and aid the defect. In the case of *Smith* v. *Asheton*, 1 Chan. Ca. 264, where there was a defective execution of the power in point or circumstance, yet the substance being performed, the court held they might relieve. So in the principal case, the neglect is only in form and circumstance. In the case of *Tollet* v. *Tollet*, 2 Wms. 489, the husband had a power to make a jointure to his wife by deed; he made it by will; this defect was set right in equity; which determination goes a great way to decide the present question; for why may not this defect be supplied, as in that case a deed be changed into a will? In the case of the *Duke of Marlborough* v. *The Earl of Carlisle*, Michaelmas Term, 1750, there was no consideration of merit to make the court supply the defect. It has likewise been objected, that the debts which are to be paid by means of this power are the debts of the husband, whereas the estate was originally the wife's; but those debts are expressly provided for by the deed of settlement.

SERGESON *v.* SEALEY.

CHANCERY. 1742.

[*Reported* 2 *Atk.* 412.]

WILLIAM PITT,[1] the son of Samuel Pitt, married Mrs. Speke, and by the marriage articles it was covenanted that if there should be one son only, and no younger children, and the wife should survive the husband, that she should have the power of disposing of £4000 by deed or will executed in the presence of three witnesses to any person she should appoint, and this sum was to be a charge upon the real estate of the husband.

Mr. William Pitt died, leaving only one son, Samuel Pitt the younger, who lived to be only nineteen, and dying before he came of age, his

[1] Part of the case, relating to different points, is omitted.

real estate descended upon Mr. Sergeson, the plaintiff's wife, who is great-niece of Samuel the elder, and heir-at-law to him, and to William Pitt his son, and to the infant Samuel the younger, the grandson of Samuel the elder.

After the death of Mr. William Pitt, Mr. Speke marries the widow; but before her second marriage, she, by articles executed in the presence of two witnesses only, appoints the sum of £2000 out of the £4000 to be for the use and benefit of her intended husband, during the coverture, and after her death to her son Samuel Pitt.

The other £2000 she makes a voluntary disposition of by will, but did not execute it in the presence of three witnesses.

Lord Chancellor [Hardwicke]. The question is, whether the articles entered into upon Mrs. Speke's marriage with Mr. Speke amount to an appointment within the power?

I am of opinion, that it is a good appointment of £2000 for the benefit of Mr. Speke; and notwithstanding it is insisted that it is a defective appointment, because there are only two witnesses, yet this court will supply the defect, where it is executed for a valuable consideration, much more where it is an execution of a trust only; and though the appointment is inaccurately expressed, and in an informal manner, it shall still amount to a grant of the £2000 to Mr. Speke; and if it amounts to a grant, what is the effect? Why, that Mr. Speke shall have the whole use and benefit of it during the coverture; and falls exactly within the reason of *Lady Coventry's Case* [2 P. Wms. 222]; where a tenant for life, with a power to make a jointure, covenants, for a valuable consideration, to execute his power, this court will supply a defective execution, or a non-execution against the remainder-man.

The next question is, as to the remaining £2000.

This was not an appointment for a valuable consideration, but only a voluntary disposition, and therefore as the will under which the £2000 is given was not executed in the presence of three witnesses, it has not pursued the power, and consequently was a void appointment, so that this £2000 sunk in the infant's real estate.

BLORE *v.* SUTTON.

Chancery. 1817.

[*Reported* 3 *Mer.* 237.]

The Master of the Rolls.[1] [Sir William Grant.] This is a bill for the specific performance of an agreement to grant a lease. The agreement is alleged to have been entered into with the agent of the late Countess of Bath, who was tenant for life, with a power of granting leases in the manner and on the terms specified in the power;

[1] The opinion only is here given.

and the question is, whether there be any such agreement in this case as is binding upon the remainder-man, the defendant Sir Richard Sutton.

It appears to me that there is no sufficient agreement in writing; first, because Charles Noble, who signs his initials to the memorandum written on the plan, is neither alleged by the bill, nor proved by the evidence, to have been the authorized agent of Lady Bath; secondly, because the memorandum does not contain some of the material terms of a building lease, which this was. It merely specifies the rent, and the number of years. It does not even specify the commencement of the lease. By the parol evidence, indeed, it is said, that it was to be from the expiration of a subsisting lease. But then the whole agreement is not in writing.

It was insisted, however, that there is a parol agreement, in part executed; for the plaintiff has expended large sums in building upon the premises, partly in Lady Bath's lifetime, but principally since her death. The agreement, it is said, is therefore binding on the remainder-man. It is rather difficult to say, that there is even a parol agreement by an authorized agent of Lady Bath. For the evidence is, that Noble, by the direction and with the privity of Mr. Cockerell, who was Lady Bath's agent, did make a verbal agreement with the plaintiff. This seems rather a delegation of Cockerell's authority, than the personal exercise of it. He does not appear to have had any communication with the plaintiff. He does not say, I ratify the terms agreed upon by Noble, but, I authorize Noble to make the agreement. Supposing, however, that, by the effect of Cockerell's direction to Noble, this can be construed to be the parol agreement of Cockerell himself, and that, subsequently to such agreement, and on the faith of it, an expenditure has been made by the plaintiff, there is no authority for holding that the remainder-man is bound by such an agreement.

It is considered as a fraud in a party permitting an expenditure on the faith of his parol agreement, to attempt to take advantage of its not being in writing. But of what fraud is a remainder-man guilty, who has entered into no agreement, written or parol, and has done no act, on the faith of which the other party could have relied? The only way in which he could be affected with fraud, would be by showing, that an expenditure had been permitted by him, with a knowledge that the party had only a parol agreement from the tenant for life. Without that knowledge, there is nothing in the mere circumstance of expenditure. For the *prima facie* presumption is, that he who is making it has a valid lease under the power, or at least a binding agreement for a lease. That the remainder-man in this case, or those acting on his behalf, had any such knowledge, is neither alleged, nor proved. The reason, therefore, fails, on which the case of a parol agreement, in part performed, is taken out of the Statute of Frauds.

On the strict construction of the power, the remainder-man would only be bound by a lease executed conformably to it. But Lord Redesdale has, I think, in the case of *Shannon* v. *Bradstreet*, 1 Sch.

& Lef. 52, given satisfactory reasons, why a clear, explicit, written agreement ought, in equity, to be held equivalent to a lease, and as binding on the remainder-man as a formal lease conceived in the same terms would have been. But, to go farther, and say, that a man shall be bound, not by his own parol agreement, but by the uncommunicated and unknown parol agreement of another person, would be to break in upon the Statute of Frauds, without the existence of any of the pretexts on which it has been already too much infringed.

On the supposition that the plaintiff cannot obtain specific performance, he prays that he may be reimbursed for his expenditure out of Lady Bath's assets. This would be, as against her representatives, a decree merely for damages, and not a compensation for the benefit her estate has received. It is the estate of the remainder-man that is benefited by the houses built upon it. The competency of a court of equity to give damages for the non-performance of an agreement, has, notwithstanding the case of *Denton* v. *Stewart*, 1 Cox, 258, been questioned by very high authorities. In that case, however, the party was guilty of a fraud, in voluntarily disabling himself to perform his agreement, and had an immediate benefit from the breach of it. But Lady Bath never refused to perform the agreement. On the contrary, the plaintiff alleges, that, if she had lived, she would have granted him a lease. Then the case is only that he himself has been so improvident as not to get from Lady Bath that which, he says, she would have given him; namely, a lease that would have been binding on the remainder-man. That, surely, is not a case in which a court of equity will exercise a doubtful jurisdiction, by awarding damages for a loss, which, if it shall ever be sustained, will have been occasioned, more by the plaintiff's negligence, than by Lady Bath's fault. I say, if it shall be ever sustained; for it does not appear that the plaintiff has been yet evicted; and I cannot believe that Sir Richard Sutton, when able to judge and act for himself, will think of taking the benefit of the plaintiff's improvements, without making him a compensation for them. But, be that as it may, I should not be warranted in straining general principles in order to obviate the hardship of a particular case.

The bill must be dismissed, but without costs.[1]

Hart and *Courtenay*, for the plaintiff.

Sir S. Romilly and *Richards*, for the defendant, Sir Richard Sutton.

Bell and *Dowdeswell*, for the defendant Codrington.

[1] Cf. *Morgan* v. *Milman*, 3 De G. M. & G. 24 (1853).

SAYER *v.* SAYER.
INNES *v.* SAYER.

CHANCERY. 1848.

[*Reported* 7 *Hare*, 377.]

THE testatrix, Judith Innes, was, at the date of her will, entitled, under three different instruments, to the dividends on several sums of stock for her life, with general powers of appointment as to part of the funds under two of the instruments. 1. Under a settlement made in February, 1800, on the marriage of herself and Thomas Innes, her deceased husband, she was entitled for her life to £1826 8*s.* 11*d.*, £3 per cent. Consols, standing in the names of the trustees of that settlement, with a power of appointment of £1000, like stock, part thereof, by her last will and testament, in writing, or any writing purporting to be her last will and testament, to be by her signed, sealed, and published, in the presence of and attested by two or more witnesses, and, in default of appointment, in trust for her next of kin living at the time of her decease. 2. The testatrix was entitled for her life to a sum of £559 4*s.* 9*d.*, New £3½ per Cents., produced by property acquired after her marriage, standing in the names of the trustees of an indenture of August, 1823, limited in remainder to the sisters of the testatrix and their issue. 3. And, under the will of her deceased husband, Thomas Innes, dated in February, 1824, the several sums of £10,000, £3 per cent. Consols; £5000, New £3½ per Cents.; £300, Long Annuities; and £1500 14*s.* 5*d.*, £3 per cent. Reduced Annuities, constituting his residuary personal estate, stood in the names of the executors and executrix of such will, of whom the testatrix was one, to the dividends of which sums she was entitled for her life, with remainder as to a third part of the same sums unto such person or persons, at such time or times, and in such parts, shares, and proportions, manner and form, as she, by any deed or deeds, writing or writings, to be by her duly executed, according to law, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, or codicil, to be by her signed and published in the presence of, and attested by two or more witnesses, should give, bequeath, direct, limit, or appoint the same; and, in default of such gift or appointment, the testator, Thomas Innes, bequeathed the same to his brother, Alexander Innes, and his children, as therein mentioned.

The testatrix had also, at the date of her will, £800, New £3½ per Cents., standing in her own name, to which she was absolutely entitled, and which, by the additions she subsequently made, was augmented at the time of her death to £12,909 19*s.*, like stock.

The testatrix, by her will, dated in January, 1833, unattested and not referring to the power, gave to the treasurer for the time being of the Sailors' Home "£1000, in the £3 per cent. Consols;" to the treasurer of the Strangers' Friend Society "£1000, in the £3 per cent. Consols;" to the British and Foreign Bible Society £500, in the £3 per cent. Consols, and the like sum to the Church Missionary Society, to be paid within six months after her decease; and to Harriet Ker Innes £500, in the £3 per cent. Consols, free of legacy duty, to be paid within such six months. The testatrix then proceeded: "The remainder in the £3 per Cents., and three separate sums in the New £3½ per Cents., with £100 a year, Long Annuities, and any other property I may die possessed of, of what nature or kind soever, I leave to my brothers," upon the trusts thereinafter named. The testatrix made eight other unattested testamentary papers, giving legacies or revoking legacies previously inserted, the last of which papers was dated the 1st of September, 1836. At the foot of the eighth testamentary paper, the testatrix had written, "This will has not been witnessed, as I intend, if I am spared, to write it out fair." The testatrix made no appointment in exercise of her powers, unless such testamentary papers could be so considered.

The testatrix died in June, 1844, and the will and other testamentary papers or codicils were admitted to probate. There was no issue of the testatrix and her husband.

The suit of *Sayer* v. *Sayer* was instituted for the administration of the estate of the testatrix; and in that suit the treasurers of the several charities claimed to be allowed their several legacies as general legacies payable out of the personal estate. The master allowed their respective claims. The report was excepted to by the residuary legatees under the will of the testatrix.

The case was argued by *Mr. Kenyon Parker*, *Mr. Romilly*, *Mr. Wood*, *Mr. Rolt*, *Mr. Faber*, *Mr. Malins*, *Mr. Glasse*, *Mr. Selwyn*, *Mr. Wickens*, and *Mr. Baggallay*, for the different parties.

The principal question argued was, whether the gifts of Consols, in the will of 1833, were to be treated as a disposition or an intended disposition of that species of stock over which the testatrix had powers of appointment under her marriage settlement and the will of her husband.

[The opinion of Sir James Wigram, V. C., on this question is omitted.]

The suit *Innes* v. *Sayer* was instituted by one of the four children of Alexander Innes, who were the residuary legatees under the will of the testator Thomas Innes, against his surviving executor, (the other children and residuary legatees being defendants,) praying that the plaintiff's fourth share of the third part of the four sums of stock might, as on default of appointment by the testatrix Judith Innes, be transferred to the plaintiff. After the judgment had been given on the exceptions in *Sayer* v. *Sayer*, the treasurers of the several charities were made parties to the suit *Innes* v. *Sayer*, by amendment, as

adverse claimants on the third part of the £10,000, £3 per cent. Consols one of such four sums. At the hearing,

The Solicitor-General, *Mr. Wood*, *Mr. Rolt*, *Mr. Blunt*, *Mr. Faber*, *Mr. Glasse*, and *Mr. Pirie*, appeared for the different parties.

Vice-Chancellor. The Ecclesiastical Court has decided, that, notwithstanding the clause at the foot of the codicil of 1836, the will is a complete testamentary paper in this sense, that the testatrix means it to operate. If the testatrix meant the will of 1833 to operate, I have only to take the paper and inquire into its construction. The question of construction was the point I had to consider in the case of *Sayer* v. *Sayer*. I thought the language did necessarily refer to the property the subject of the power; and, referring to that property and intending the paper to operate as her will, (which I now assume to be the case,) I must conclude that the testatrix has declared her intention to execute the power. The only point, then, which has to be considered, is, what the effect of the will is to be.

It is only in the case of the legacies to the charities that the claim which I have now to consider can be made; and it appears to me, that the only question is, whether the authorities ought to bind me. I must attend to the decisions to ascertain whether they cover a given point, and when I have done so, and find that there are decisions in analogous cases, and that there are also *dicta* of learned judges pointing to the same conclusion, consider whether I ought, by any decision of mine, to shake that which is considered to have been the settled law, if not before the Statute of Elizabeth, certainly ever since. It cannot be denied that there are express decisions of the highest authority, that the court will supply the want of a surrender of a copyhold in favor of a charity. The supplying the surrender of a copyhold, and the supplying the execution of a power which is defective in form, go hand in hand. It appears to me, that wherever you find a decision that the court will supply the surrender, it follows (unless this case be an exception) that the court will also supply the defective execution of a power. Such a case is, by analogy at least, a strong authority for the proposition contended for.

With regard to a tenancy in tail, the distinction is palpable. No doubt the tenant in tail has the whole interest. It is not the case of a mere execution of a power. At the same time, if he does not acquire the dominion of the estate in the form which the law requires, it goes to the issue in tail as a *quasi* purchaser. The issue take, not under the immediate ancestor, but under the author of the estate tail. Yet, even in this case, we find that, although the court will not perfect any intention which the testator may have manifested to bar the estate tail in favor of his creditor, wife, or child, that object not having been effected, the court will give effect to the intended disposition of the estate in favor of a charity — carrying it therefore in the case of a charity, for some reason or other, beyond the case of the creditor, wife, or child. The existence of such a class of cases certainly furnishes a second

ground for following what has hitherto been considered the rule of the court.

The third ground is the *dicta* which unquestionably are to be found in favor of the proposition, that a charity is entitled, notwithstanding the power is not well exercised. The case of *Piggot* v. *Penrice*, Pre. in Ch. 471, with the note, Id. 473, appears to be an authority for the proposition in question. As the case is reported in Comyns, page 250, it would appear to be a direct authority on the point. At all events, I cannot disregard it as a decision, unless those who ask me to do so can show me that the case is materially distinguishable from the present case.

So much of analogy and *dicta* being found, I may refer to the opinion of text writers; and when text writers of great experience treat it as a settled principle of law, that the court will supply the execution, — so much, as I have said, being found to justify their opinion, — that is also a reason why I ought not to take upon myself to unsettle what hitherto has been considered the rule of the court.

The principle upon which the court appears to go is this, that, if a person has power by his own act to give property, and has by some paper or instrument clearly shown that he intended to give it, although that paper, by reason of some informality, is ineffectual for the purpose, yet the party having the power of doing it by an effectual instrument, and having shown his intention to do it, the court will, in the case of a charity, by its decree make the instrument effectual to do that which was intended to be done. It is not for me to give any opinion, whether the principle is right or not. There appears to be very high authority for the application of the principle, independently of the Statute of Elizabeth; and it has been applied since the Statute. I think, therefore, I ought not to entertain any question upon the point. If the point is to be hereafter considered and treated differently, it ought to be ruled by a higher authority than the judge who presides in this court.

There is another question, with reference to the different sums of Consols, which I must consider. It is, no doubt, the intention of the testatrix that the persons who would take in default of appointment under her husband's will, should not take the residue of the stock. It is clear she meant to intrench on the £1000 stock under the settlement; for by her will she disposes of more than the third of the Consols to which the power under her husband's will extends. There is nothing upon the will to intimate that she intended the fund to come out of one of those sums of stock, rather than the other. I must take the will as saying, "There are two sums of Consols over which I have a power of appointment: with respect to that stock, I give so much to the charity, and the residue to certain persons named." Those persons cannot take under that appointment, although the charity can. I do not see my way to marshalling the claims on the different funds. If I attempted to do so, I might to some extent be giving effect to the

appointment in favor of those persons who are excluded by the circumstance of its informality.

The case was afterwards spoken to on minutes. The £1000 Consols, standing in the names of the trustees of the settlement of February, 1800, not being a subject of this suit, it was suggested that the charities should in this suit take no more than an apportioned part of their legacies out of the Consols which formed part of the residuary estate of Thomas Innes to be administered in this suit.[1]

MORSE *v.* MARTIN.

CHANCERY. 1865.

[*Reported* 34 *Beav.* 500.]

THE testator died in 1812, having, by his will, bequeathed £10,000 in trust for Alexander Thomas Morse and Henrietta his wife, successively, for life, and afterwards as follows: — "Upon trust to pay the said principal sum of £10,000 unto, between or amongst all and every the child and children of them the said Alexander Thomas Morse and Henrietta Morse, or such one or more of the said children, in such parts, shares and proportions, and with, under and subject to such powers, provisos and limitations as he, the said Alexander Thomas Morse, shall, by any deed or deeds in writing, or by his last will and testament duly executed and *attested by two or more credible witnesses*, direct, limit or appoint. And in default of any such direction, limitation or appointment, upon trust to pay the said sum of £10,000 unto the children of the said Alexander Thomas Morse and Henrietta Morse equally, to be divided between them, share and share alike, and their respective executors and administrators."

In 1814, Alexander Thomas Morse, by his will, attested by two witnesses, appointed the fund amongst his children, and as to £3000 he bequeathed it to his daughter Harriet for life, with remainder (which

[1] The minute of decree was: "Declare, that the testatrix intended by her unattested will, dated the 13th of January, 1833, to execute the general power of appointment given or reserved to her by the will of her late husband Thomas Innes, deceased, over one-third part of his residuary estate; and that the defective execution of the said power, by reason of the non-attestation of the will of the said testatrix, ought to be supplied in favor of the four charitable institutions therein mentioned. Directions for transfer of the stock, and payment of the accrued dividends to the several treasurers accordingly. Such transfer and payment to be without prejudice to the right (if any) of the plaintiff and the other residuary legatees of Thomas Innes to enforce contribution in respect of the said sums, stocks, and cash, against the £1000, £3 per cent. Consols, standing in the names of the trustees of the settlement of February, 1800, on which the testatrix had a general power of appointment."

The judgment of the Vice-Chancellor was affirmed, *Innes* v. *Sayer*, 3 Mac. & G. 606, 620-622 (1851); and was followed in *Pepper's Will*, 1 Pars. Eq. 436 (1850).

failed) to her husband and children, and in case she should not happen to marry, then to his three sons George, James and Anthony.

On the next day, Alexander Morse made a codicil, *attested by one witness only*, whereby he revoked the gift of the £3000 to his three sons, and appointed £1000, part of it, "for such uses, intents or purposes" as his daughter Harriet should, by her last will, appoint, and he appointed the remaining £2000 "upon trust for George Morse, James Morse and Anthony Morse [his three sons], their executors, administrators and assigns."

Harriet survived her parents and died a spinster in 1862. She made a will in 1859, disposing of "the whole of the property she might be entitled to," and she appointed a residuary legatee.

Several questions arose. — First, whether the court would aid the execution of the power attempted to be exercised by the codicil, which was attested by one witness only. Secondly, whether Alexander Thomas Morse had authority to appoint the £1000 to Harriet for life, and then as she should appoint by will. Thirdly, whether the codicil might not be good as a revocation, though invalid as a new appointment.

Mr. Cole and *Mr. Renshaw*, for the plaintiff, the executor of Harriet.

Mr. J. Napier Higgins, for the executor of James, and *Mr. Williamson*, for the representatives of George.

Mr. Selwyn and *Mr. Waller*, for the legal personal representatives of Anthony.

Mr. Baggallay and *Mr. T. Stevens*, for the legal personal representatives of Maria.

The Master of the Rolls. [Sir John Romilly.] If I were to decide against the plaintiff I should be overruling a settled principle relating to powers which has been established by a series of authorities.

I think it quite settled, that, in dealing with powers, when you give the appointee the absolute power of disposing of the property, you make an appointment in favor of that person; *Bray* v. *Bree*, 2 Cl. & Fin. 453, is always cited as an authority for that proposition. In *Thornton* v. *Bright*, 2 Myl. & Craig, 230, under a power to appoint to children, an appointment was made to trustees for the separate use of a daughter for life, with power, if she predeceased her husband, to appoint by will to her children, and it was held that this was a perfectly good execution of the power. Again, *Phipson* v. *Turner*, 9 Sim. 227, is expressly in point. If I were to hold otherwise, I should overrule many authorities, and disregard what has been stated by Lord St. Leonards to be a leading principle.

I am therefore of opinion that the appointment to Harriet for life, and in case she shall not happen to marry, for such uses, intents and purposes as she shall by will appoint, is a good execution of the power given to her father.

That being so, it is not disputed that this court will supply a defective execution of a power in favor of a daughter. But the point raised

is this: — that the court will not supply the defect in favor of a daughter to the prejudice of a person standing in the same relationship, as, for instance, as between brother and sister, it will not aid a defective execution in favor of a sister so as to take the property away from her brother. The answer to this was properly given in argument, which is this: that if the others are provided for, it will. The point is decided by *Lucena* v. *Lucena*, 5 Beav. 249, and *Hume* v. *Rundell*, 6 Madd. 331.

I am of opinion that this was a good execution of the power, and that the defect in its execution will be supplied by this court.

JOHNSON *v.* TOUCHET.

CHANCERY. 1867.

[*Reported* 37 *L. J. Ch. N. S.* 25.]

BILL[1] against John Hastings Touchet, Richard Burgass, and Mary Dennis, the trustees and executors of the will of James Dennis, praying a declaration that a covenant in the marriage settlement of the plaintiff with Ann Dennis ought, in equity, to be deemed a sufficient execution of a power given to her by the will of James Dennis.

James Dennis, who died in 1855, devised and bequeathed the residue of his real and personal estate to the defendants upon trust, as to one undivided fifth part thereof, "for such person and persons, for such estate or estates, interest and interests, intents and purposes, and altogether in such manner and form" as Ann Dennis, after she should "attain the age of twenty five years and not before" should by deed or deeds from time to time and at any time appoint, and in default of such appointment to pay the income to Ann Dennis during her life, and after her decease "for such person or persons, for such estate or estates, interest or interests, intents and purposes, and altogether in such manner and form" as Ann Dennis after she should "attain the age of twenty-five years and not before" should, by her last will, appoint; and in default of such appointment for her children, who being males should attain twenty-one, or being females should attain that age or marry.

In 1859, by an indenture between the plaintiff, Ann Dennis, and the defendant, John Hastings Touchet, and one James Dennis, after a recital that Ann Dennis was then about twenty-three years old, that a marriage was contemplated between her and the plaintiff, and that upon the treaty for the marriage it was agreed that Ann Dennis should enter into the covenant therein contained, it was witnessed that in pursuance of said agreement, and in consideration of said contemplated marriage, Ann Dennis and the plaintiff covenanted with said Touchet and James

[1] The following statement is substituted for that in the report.

Dennis that in case the marriage should take effect and Ann Dennis should attain the age of twenty-five, she would appoint the property over which she should, on attaining twenty-five, have a power of appointment to said Touchet and James Dennis, in trust to pay the income to Ann Dennis during her life, and on her death to the plaintiff, and on the death of the survivor, to hold the principal for such one or more of her children, as she should appoint, and in default of such appointment for her children who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, with gifts over.

After the making of this indenture the marriage between the plaintiff and Ann Dennis took effect. Ann Johnson attained the age of twenty-five in 1861. She died in 1864, leaving a husband and two children, and not having exercised the power of appointment.

Mr. Bacon and *Mr. Macnaghten*, for the plaintiff.

Mr. Dickinson and *Mr. Latham*, for the infant children of the plaintiff.

Mr. H. F. Shebbeare, for the persons entitled under the gifts over, on failure of the trusts in favor of Mrs. Johnson's children.

Mr. F. H. Colt, for the trustees Touchet and Mary Dennis.

STUART, V. C. The principles on which cases of this description depend are well settled. A covenant to exercise a power, if it has any operation at all, has it from the time of the execution of the covenant. If the covenant be one in favor of the children, or of persons who acquire rights recognized by the court, such as purchasers under a marriage settlement, it becomes particularly the object of the court's attention. The main argument against the alleged operation of the covenant in the present case was, that there was an express provision in the creation of the power that it should not be exercised until the donee of it should have attained the age of twenty-five years. It appears, however, that the donee, at the age of twenty-three years, executed the covenant which is now asked to be declared a valid exercise of the power. The object of the donor of the power, in providing that the donee should not exercise it until twenty-five years of age, is fully attained by the circumstance that, from the nature of the covenant itself, it could have had no operation if the donee had died before attaining the age of twenty-five years. There cannot, I think, be a doubt, where there is a covenant of this kind, that, if the donee, having executed the covenant, survives the prescribed age, but refuses to perform the covenant by executing a formal appointment, this court will compel him to do so. Had that been the case here, it would have been one of a person called upon to perform a covenant entered into for a valuable consideration, contemplating the execution of an appointment at a future time. The effect of such a covenant is to bind the property by an equitable execution of the power. I abide by all that is stated in the report of my judgment in the case of *Affleck* v. *Affleck*.[1] The

[1] 3 Sm. & G. 394 (1857). In this case A. on his marriage covenanted that if he came into possession he would exercise a power of jointuring which could be exercised

decision arrived at in that case was founded on the accurate statement of the principles laid down by Lord Redesdale in *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52. There, Lord Redesdale, in speaking of powers to jointure, said: "It has been determined that a covenant is a sufficient declaration of intent to execute, even when made before the power arose, as where a power is limited to be exercised by a tenant for life in possession, and he covenants that when he comes into possession he will execute. In all these cases courts of equity have relieved." There, as in other cases, the covenant was made before the strict right to execute the power had, according to the terms of it, arisen; but it was decided that that was no substantial reason why the court should refuse to treat the covenant as a sufficient execution of the power. The other argument put forward in the present case to induce the court to treat this covenant as an invalid execution was, that the children, who are the objects of the original power as well as of the marriage settlement, will, if the covenant in it is not held to be an execution of the power, take immediately, under the limitation in the will, in default of appointment. But then the question still remains the same. If the covenant is a valid execution of the power, it cuts off the limitation in default of appointment. The case of the children might have been better if the covenant had not been executed; but as it is, they do not suffer much. Then, again, there is the interest of the husband to be considered. He is clearly entitled, under the marriage settlement, to the benefit of the covenant. Its execution formed part of the consideration for the marriage contract; and the court is bound to regard that. There must, therefore, be a declaration that the covenant binds the property. The costs of all parties as between solicitor and client, must be paid out of the share of the trust property to which the suit relates.

only by tenant for life in possession. Before coming into possession G. became lunatic. Stuart, V. C., *held*, that the covenant was a defective execution of the power, and should be enforced after G. came into possession against the remainder-man. But cf. *Cooper* v. *Martin*, L. R. 3 Ch. 47 (1867). — Ed.

Note. — On the validity of a covenant to exercise a special testamentary power in favor of one of its objects, see *Thacker* v. *Key*, L. R. 8 Eq. 408 (1869); *Bultcel* v. *Plummer*, L. R. 6 Ch. 160 (1870).

Fraud on Powers. If the donee of a special power exercises it in bad faith, with the intention of benefiting persons who are not objects of the power, equity will interfere. If, for instance, A., having a power to appoint to one or more of a class, makes an agreement with B., who is a member of the class, that he will appoint the whole fund to B. if B. will thereupon pay to him a sum equal to half the fund appointed, equity will set this appointment aside.

Cases calling for the exercise of this jurisdiction by courts of equity are common in the English books, but have been rare in the United States.

On this topic see particularly *Aleyn* v. *Belchier* and notes in 1 L. C. in Eq. (6th ed.) 437; and also 1 Leake, Dig. Land Law, 430 *et seqq.*

On appointments under non-exclusive powers held bad in equity, because illusory, see pp. 369–378, *ante*.

CHAPTER XII.

RULE AGAINST PERPETUITIES.

SECTION I.

IN GENERAL.

CHILD *v.* BAYLIE.

KING'S BENCH AND EXCHEQUER CHAMBER. 1618.

[*Reported Cro. Jac.* 459.]

EJECTMENT of a lease of Thomas Heath of lands in Alchurch.

Upon Not guilty pleaded, a special verdict was found upon the case; which was, that William Heath, possessed of a lease for seventy-six years of the land in question, let it to one Blunt from the day of his death until the first of May, 1629 (which was three months before the end of the lease), if Dorothy his wife lived so long. Afterwards he devised, that William Heath his son and his assigns should have the said tenements, and the reversion of them, and all his title and interest in the said tenements, for all the others of the said seventy-six years which should be unexpired at the time of his wife's death, "provided, that if the said William die without issue living at the time of his death, that Thomas his son (the now lessor) should have it for all the residue of the seventy-six years unexpired from the death of his said wife, and of William without issue; and if he died without issue, then to his daughters;" and made his wife his executrix, and died. The wife assented to the legacies; William assigned all this lease and his interest thereto to the said Dorothy, who assigned it to Mr. Comb, under whom the defendant claims: afterwards Dorothy died, and then William died without issue. Thomas the devisee enters, and makes this lease to the plaintiff.

After divers arguments at the bar, it was adjudged for the defendant.

First, it was resolved, where a lessee for years let it after his death until the first of May, 1629, that it was a good lease, which began immediately by his death, he dying within that time.

Secondly, that the lease being made to begin after his death unto the first of May, 1629, the lease being made (12 August, 1553), if Dorothy his wife should so long live, he did not thereby convey the interest and remainder of the term, viz. from the first of May, 1629, to 12

August, 1629, and the possibility of a long term if Dorothy died before the first of May, 1629, which interest and possibility together he might devise to William Heath his son.

The third and main question was, whether this devise being to William Heath and his assigns, with a *proviso*, that if he died without issue living, that Thomas Heath should have it, and he aliens it, and afterwards dies without issue, whether this alienation shall bind Thomas Heath, or that he may avoid it?

It was resolved, that this alienation shall bind; for when he limited to him and his assigns, all the estate was vested in him, and he had an absolute power to dispose thereof; for the law doth not expect his dying without issue. The difference therefore is, where a lease is devised to one *if he live so long*, and afterward to another, the first hath but a qualified estate, and the other hath the absolute interest, and therefore this alienation shall not prejudice him who hath the absolute estate; but when it is limited to him and *his assigns*, then the proviso thereto added, is void to restrain the alienation: and the limitation to the heirs of the body, and the *proviso*, are all one; for all long leases would be more dangerous than perpetuities: and therefore this case differs from the cases in 8 Co. 96, and 10 Co. 46, *Lampet's Case*, that a devisee for life could not bar him in remainder: and *Lewknor's Case*, Easter Term, 14 Jac. 1; 1 Roll. Rep. 356, in the Exchequer Chamber, was cited. Wherefore it was adjudged for the defendant.

Note. — Upon this judgment a writ of error was brought in the Exchequer Chamber; and the error assigned in point of law, that the remainder of this term limited to Thomas Heath after the death of William without issue then living, was good, and the alienation of William shall not bind him in remainder.

It was argued by *Bridgman*, and afterward by *Humphrey Davenport*, for the plaintiff in error, that it was a good limitation of the remainder of the term to William and his assigns, with the *proviso*, that if he died without issue then living, the then remainder should be to Thomas, &c., and that it is no more in effect than after his death; and therefore it differs from *Lewknor's Case*, adjudged in the Exchequer, where a devise of a term to one, and the heirs of his body, and if he die without issue, that it shall remain to another, was held to be a void remainder; for he cannot limit a remainder upon a term after the death of another without issue: but here it is but a remainder after the death of one without issue, viz. William dying without issue then living; so upon the matter it depended upon is death, and therefore not like to the said case; but it is agreeable to the reasons put in the cases of 8 Co. 94, *Matth. Manning's Case*, and 10 Co. 46.[1]

[1] Palmer reports Serjeant Davenport as saying: "There is no danger of perpetuity by such a conveyance. For he took a diversity when the contingency is such as can or ought [*doet*] to happen in the life of the devisee. There a remainder limited on such an estate in case of a devise of a chattel is good, as in our case, if he should die without issue of his body living at the time of his death, so that it does not exceed

But it was now argued on the other part by *Thomas Crew* and *George Croke*, that the judgment was well given in the King's Bench; for here the limitation being to William after the death of the devisor's wife, of all his estate and interest to him and his assigns, it is but a remainder; for the wife may outlive all the term, and then this devise of the remainder of the term is given to him in particular, and William hath but a possibility; and then to limit it to Thomas after the death of William then living, is to limit a possibility upon a possibility, which is against the rules of law, as it is held in the *Rector of Chedington's Case*, 1 Co. 156, and *Lord Stafford's Case*, 8 Co. 73.

Secondly, that this limitation to Thomas after the death of William without issue then living, is all one as if it had been limited upon his death without issue: and the addition "*then living*," doth not alter the case; for at the first limitation, *non constat* that he should die without issue; and the law shall not expect his death without issue; and it is not like to the case when it is limited after the death of one; for it is certain that one must die, and it may be that he may die during the term, and the law may well expect it; but that one should die without issue, the law will never expect such a possibility, nor regard it: and it would be very dangerous to have a perpetuity of a term in that manner; for it would be more mischievous than the common cases of perpetuities which the law hath sought to suppress: and therefore it was said, that this case was like to some of the cases which had been adjudged, that the remainder of a term after the death of one person is good, and should not be destroyed by the alienation of the first devisee. *Vide* 8 Co. 94, *Manning's Case*. 10 Co., *Lampet's Case*. Plowd. 520 and 540; Dyer 74, 277.

After divers arguments, all the judges of the Common Pleas, viz. HOBART, WINCH, HUTTON, and JONES, and all the Barons (except TANFIELD, Chief Baron) agreed with the first judgment: for they said, that the first grant or devise of *a term* made to one for life, remainder to another, hath been much controverted, whether such a remainder might be good, and whether all may not be destroyed by the alienation of the first party; and if it were now first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute it. — But for the case in question, where there was a devise to one and his assigns, and if he died without issue then living, that it would remain to another, it is a void devise; and it is all one as the devise of a term to one and his heirs of his body, and if he die without issue, that then it shall remain to another, it is merely void; for such an entail of a term is not allowable in law, for the mischief which otherwise would ensue, if there should be such a perpetuity of a term. — And

his life. But if the contingency be such as is foreign [*forrain*], or is to commence *in futuro* after the death of the first devisee, there, because such a limitation tends to make a perpetuity, a remainder limited on it is bad, as if he should die without issue or without heir, that then it shall remain over. And on this diversity they strongly [*fortement*] rely." *Child* v. *Baylie*, Palm. 333, 334. — ED.

although TANFIELD, Chief Baron, doubted thereof, especially by reason of a judgment given before in the King's Bench in *Rethorick* v. *Chappel*, Hil. 9 Jac. 1; 2 Bulst. 28; Godol. 149, where "William Cary possessed of a term for years devised it to his wife for her life, and afterwards that John his son should have the occupation thereof as long as he had issue; and if he died without issue unmarried, that then Jasper his younger son should have the occupation thereof as long as he had issue of his body; and if he died without issue unmarried, he devised the moiety to Dorothy his daughter, the other moiety to Robert and William his sons, and made his wife executrix, who assented to the legacies and died. John and Jasper died without issue, unmarried; and afterward Robert and William entered upon the defendant, claiming the moiety, and let to the plaintiff. Upon a special verdict, all this matter being discovered, it was adjudged for the plaintiff, that he should recover the moiety, which is all one case with the case in question. But the defendant's counsel in the writ of error showed, that there was a difference betwixt the said cases: for first, in that there is a devise but of the occupation only; but here, of the term itself. Secondly, it is a devise here of his estate and term to him and his assigns, wherein is authority given that he may assign. Thirdly, the limitation is there, if he die without issue unmarried, which is upon the matter, that if he die within the term; for if he be not married he cannot have issue" — but in the case here, he might have issue; and yet if that issue should die without issue in his life-time, it should remain; which the law will neither expect nor will suffer: yet the JUSTICES AND BARONS, by the assent of TANFIELD, all agreed, that judgment should be affirmed: and in Hilary Term, 20 Jac. I., it was affirmed.

DUKE OF NORFOLK'S CASE.

CHANCERY. 1682.

[*Reported* 3 *Ch. Cas.* 1.]

LORD NOTTINGHAM, C.[1] This is the case. The plaintiff, by his bill, demands the benefit of a term for two hundred years, in the barony of Grostock, upon these settlements.

Henry Frederick, late Earl of Arundel and Surrey, father of the plaintiff and defendant, had issue, Thomas, Henry, Charles, Edward, Francis, and Bernard; and a daughter, the Lady Katharine: Thomas

[1] In this case LORD CHANCELLOR NOTTINGHAM was assisted by LORD CHIEF JUSTICE PEMBERTON, LORD CHIEF JUSTICE NORTH, and LORD CHIEF BARON MONTAGUE. The judges delivered their opinions in succession on March 24, 1682, agreeing that the limitation in question was void. The opinions are reported 3 Ch. Cas. 14-26. The Lord Chancellor differed from the judges, and delivered the opinion here printed, which sufficiently states the facts. — ED.

Lord Maltravers, his eldest son, was *non compos mentis*, and care is taken to settle the estate and family, as well as the present circumstances will admit. And thereupon there are two indentures drawn, and they are both of the same date. The one is an indenture between the Earl of Arundel of the one part: and the Duke of Richmond, the Marquis of Dorchester, Edward Lord Howard of Estericke, and Sir Thomas Hatton of the other part: it bears date the twenty-first day of March, 1647. Whereby an estate is conveyed to them and their heirs; to these uses: to the use of the earl for his life.

After that to the countess his wife for her life, with power to make a lease for twenty-one years, reserving the ancient rents.

The remainder for two hundred years to those trustees, and that upon such trusts, as by another indenture, intended to bear date the same day, the earl should limit and declare; and then the remainder of the lands are to the use of Henry, and the heirs male of his body begotten, with the remainders in tail to Charles, Edward, and the other brothers successively.

Then comes the other indenture, which was to declare the trust of the term for two hundred years, for which all these preparations are made, and that declares that it was intended this term should attend the inheritance, and that the profits of the said barony, &c. should be received by the said Henry Howard, and the heirs male of his body, so long as Thomas had any issue male of his body should live, (which was consequently only during his own life, because he was never likely to marry) and if he die without issue in the life-time of Henry, not leaving a wife *privement enstent* of a son, or if after his death, the dignity of Earl of Arundel should descend upon Henry; then Henry or his issue should have no farther benefit or profit of the term of two hundred years. Who then shall? But the benefit shall redound to the younger brothers in manner following. How is that? To Charles and the heirs male of his body, with the like remainders in tail to the rest. Thus is the matter settled by these indentures; how this family was to be provided for, and the whole estate governed for the time to come.

These indentures are both sealed and delivered in the presence of Sir Orlando Bridgman, Mr. Edward Alehorn, and Mr. John Alehorn, both of them my Lord Keeper Bridgman's clerks; I knew them to be so.

This attestation of these deeds is a demonstration to me they were drawn by Sir Orlando Bridgman.

After this the contingency does happen: for Thomas Duke of Norfolk dies without issue, and the earldom of Arundel as well as the dukedom of Norfolk, descended to Henry now Duke of Norfolk, by Thomas his death without issue: presently upon this the Marquis of Dorchester, the surviving trustee of this estate, assigns his estate to Marriot; but he doth it upon the same trusts that he had it himself: Mr. Marriot assigns his interest frankly to my Lord Henry, the now duke, and so has done what he can to merge and extinguish the term by the assigning it to him, who has the inheritance.

To excuse the Marquis of Dorchester from co-operating in this matter, it is said, there was an absolute necessity so to do; because the tenants in the north would not be brought to renew their estates, while so aged a person did continue in the seigniory, for fear, if he should die quickly, they should be compelled to pay a new fine. But nothing in the world can excuse Marriot from being guilty of a most wilful and palpable breach of trust, if Charles have any right to this term: so that the whole contention in the case is, to make the estate limited to Charles void; void in the original creation; if not so, void by the common recovery suffered by the now duke, and the assignment of Marriot. If the estate be originally void, which is limited to Charles, there is no harm done; but if it only be avoided by the assignment of Marriot, with the concurrence of the Duke of Norfolk, he having notice of the trusts, then most certainly they must make it good to Charles in equity, for a palpable breach of trust, of which they had notice. So that the question is reduced to this main single point, whether all this care that was taken to settle this estate and family, be void and insignificant: and all this provision made for Charles and the younger children to have no effect?

I am in a very great strait in this case: I am assisted by as good advice, as I know how to repose myself upon, and I have the fairest opportunity, if I concur with them, and so should mistake, to excuse myself, that I did *errare cum patribus;* but I dare not at any time deliver any opinion in this place, without I concur with myself and my conscience too.

I desire to be heard in this case with great benignity, and with great excuse for what I say, for I take this question to be of so universal a concernment to all men's rights and properties, in point of disposing of their estates, as to most conveyances, made and settled in the late times and yet on foot, that being afraid I might shake more settlements than I am willing to do, I am not disposed to keep so closely and strictly to the rules of law as the judges of the common law do, as not to look to the reasons and consequences that may follow upon the determination of this case.

I cannot say in this case, that this limitation is void, and because this is a point, that in courts of equity (which are not favored by the judgments of the courts of law) is seldom debated with any great industry at the bar; but where they are possessed once of the cause, they press for a decree, according to the usual and known rules of law; and think we are not to examine things. And because it is probable this cause, be it adjudged one way or other, may come into the parliament, I will take a little pains to open the case, the consequences that depend upon it, and the reasons that lie upon me, as thus persuaded, to suspend my opinion.

Whether this limitation to Charles be void or no, is the question. Now, first, these things are plain and clear, and by taking notice of what is plain and clear, we shall come to see what is doubtful.

1. That the term in question, though it were attendant upon the inheritance, at first, yet upon the happening of the contingency, it is become a term in gross to Charles.

2. That the trust of a term in gross can be limited no otherwise in equity, than the estate of a term in gross can be limited in law: for I am not setting up a rule of property in chancery, other than that which is the rule of property at law.

3. It is clear, that the legal estate of a term for years, whether it be a long or a short term, cannot be limited to any man in tail, with the remainder over to another after his death without issue; that is flat and plain, for that is a direct perpetuity.

4. If a term be limited to a man and his issue, and if that issue die without issue, the remainder over, the issue of that issue takes no estate; and yet because the remainder over cannot take place, till the issue of that issue fail, that remainder is void too, which was *Reeve's Case;* and the reason is, because that looks towards a perpetuity.

5. If a term be limited to a man for life, and after to his first, second, third, &c. and other sons in tail successively, and for default of such issue the remainder over, though the contingency never happen, yet that remainder is void, though there were never a son then born to him; for that looks like a perpetuity, and this was *Sir William Backhurst his Case* in the sixteen of this king.

6. Yet one step further than this, and that is *Burgiss's Case*. A term is limited to one for life, with contingent remainders to his sons in tail, with remainder over to his daughter, though he had no son; yet because it is foreign and distant to expect a remainder after the death of a son to be born without issue, that having a prospect of a perpetuity, also was adjudged to be void.

These things having been settled, and by these rules has this court always governed itself: but one step more there is in this case.

7. If a term be devised, or the trust of a term limited to one for life, with twenty remainders for life, successively, and all the persons *in esse*, and alive at the time of the limitation of their estates, these though they look like a possibility upon a possibility, are all good, because they produce no inconvenience, they wear out in a little time with an easy interpretation, and so was *Alford's Case*. I will yet go farther.

8. In the case cited by *Mr. Holt*, *Cotton and Heath's Case*, a term is devised to one for eighteen years, after to C. his eldest son for life, and then to the eldest issue male of C. for life, though C. had not any issue male at the time of the devise, or death of the devisor, but before the death of C. it was resolved by Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, to whom it was referred by the Lord Keeper Coventry, that it only being a contingency upon a life that would speedily be worn out, it was very good; for that there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself: but the contrary rule given as a reason by my Lord Popham in the *Rector of Cheding-*

ton's Case, looks like a reason of art; but, in truth, has no kind of reason in it, and I have known that rule often denied in Westminster Hall. In truth, every executory devise is so, and you will find that rule not to be allowed in *Blanford and Blanford's Case*, 13 Jac. I. part of my Lord Rolls, 318, where he says, if that rule take place, it will shake several common assurances: and he cites *Paramour's and Yardley's Case* in the commentaries where it was adjudged a good devise, though it were a possibility upon a possibility.

These conclusions, which I have thus laid down, are but preliminaries to the main debate. It is now fit we should come to speak to the main question of the case, as it stands upon its own reason, distinguished from the reasons of these preliminaries; and so the case is this.

The trust of a term for two hundred years is limited to Henry in tail, provided if Thomas die without issue in the life of Henry, so that the earldom shall descend upon Henry, then go to Charles in tail; and whether this be a good limitation to Charles in tail, is the question; for most certainly it is a void limitation to Edward in tail, and a void limitation to the other brothers in tail: but whether it be good to Charles is the doubt who is the first taker of this term in gross; for so it is (I take it) now become, and I do, under favor, differ from my Lord Chief Justice in that point; for, if Charles die, it will not return to Henry; for that is my Lord Coke's error in *Leonard Loveis's Case;* for he says, that if a term be devised to one and the heirs male of his body, it shall go to him or his executors, no longer than he has heirs male of his body; but it was resolved otherwise in *Leventhorp's and Ashby's Case*, 11 Car. B. R. Rolls's adjudgment, title devise, fol. 611, for these words are not the limitation of the time, but an absolute disposition of the term.

But now let us, I say, consider whether this limitation be good to Charles or no. It hath been said,

Object. 1. It is not good by any means; for it is a possibility upon a possibility.

Answ. That is a weak reason, and there is nothing of argument in it, for there never was yet any devise of a term with remainder over, but did amount to a possibility upon a possibility, and executory remainders will make it so.

Obj. 2. Another thing was said, it is void, because it doth not determine the whole estate, and so they compare it to *Sir Anthony Mildmay's Case*, where it is laid down as a rule, that every limitation or condition ought to defeat the entire estate, and not to defeat part and leave part not defeated; and it cannot make an estate to cease as to one person, and not as to the other. But,

Answ. I do not think, that any case or rule was ever worse applied than that to this; for if you do observe this case, here is no *proviso* at all annexed to the legal estate of the term, but to the equitable estate, that is built upon the legal estate, unto the estate to Henry, and the

heirs male of his body, to attend the inheritance with a *proviso* if Thomas die without issue in Henry's life, and the earldom come to Henry, then to Charles: which doth determine the estate to Henry, and his issue; but the other estate given to Charles doth arise upon this *proviso*, which makes it an absurdity to say, that the same *proviso*, upon which the estate ariseth, should determine that estate too.

Obj. 3. The great matter objected is, it is against all the rules of law, and tends to a perpetuity.

Answ. If it tends to a perpetuity, there needs no more to be said, for the law has so long labored against perpetuities, that it is an undeniable reason against any settlement, if it can be found to tend to a perpetuity.

Therefore let us examine whether it do so, and let us see what a perpetuity is, and whether any rule of law is broken in this case.

A perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it, as are in no sort in the power of the tenant in tail in possession, to dock by any recovery or assignment, but such remainders must continue as perpetual clogs upon the estate: such do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and the policy of the law, and therefore not to be endured.

But on the other side, future interests, springing trusts, or trusts executory, remainders that are to emerge and arise upon contingencies, are quite out of the rules and reasons of perpetuities, nay, out of the reason upon which the policy of the law is founded in those cases, especially, if they be not of remote or long consideration; but such as by a natural and easy interpretation will speedily wear out, and so things come to their right channel again.

Let us examine the rule with respect to freehold estates, and see whether there it will amount to the same issue.

There is not in the law a clearer rule than this, that there can be no remainders limited after a fee-simple, so is the express book-case, 29 Hen. VIII. 33, in my Lord Dyer; but yet the nature of things, and the necessity of commerce between man and man, have found a way to pass by that rule, and that is thus; either by way of use, or by way of devise: therefore if a devise be to a man and his heirs, and if he die without issue in the life of B. then to B. and his heirs: this is a fee-simple upon a fee-simple, and yet it has been held to be good.

My Lord Chief Baron did seem to think, that this resolution did take its original from *Pell's and Brown's Case;* but it did not so, the law was settled before; you may find it expressly resolved 19 Eliz. in a case between *Hynde and Lyon*, 3 Leonard. Which, of the books that have lately come out, is one of the best; and it was there adjudged to be so good a limitation, that the heir who pleaded *riens per descent* was forced to pay the debt, and it had the concurrence of a judgment in 38 Eliz. grounded upon the reason of *Wellock and Hammond's Case,*

cited in *Beraston's Case*, where it is said, Crook, Eliz. 204, in a devise it may well be, that an estate in fee shall cease in one, and be transferred to another: all this was before *Pell's and Brown's Case*, which was in 18 Jac. It is true, it was made a question afterwards in the serjeant's case; but what then? We all know that to be no rule to judge by; for what is used to exercise the wits of the serjeants, is not a governing opinion to decide the law. It was also adjudged in Hil. 1649, when my Lord Rolls was Chief Justice, and again in Mich. 1650, and after that indeed in 1651, it was resolved otherwise in *Jay and Jay's Case*, but it has been often agreed that where it is within the compass of one life, that the contingency is to happen, there is no danger of a perpetuity. And I oppose it to that rule which was taken by one of the lords and judges, that where no remainders can be limited, no contingent remainders can be limited, which I utterly deny, for there can be no remainder limited after a fee-simple, yet there may a contingent fee-simple arise out of the first fee, as hath been shown.

Thus it is agreed to be by all sides in the case of an inheritance; but now say they, a lease for years, which is a chattel, will not bear a contingent limitation in regard of the poverty and meanness of a chattel-estate. Now as to this point, the difference between a chattel and an inheritance is a difference only in words, but not in substance, nor in reason, or the nature of the thing; for the owner of a lease has as absolute a power over his lease as he that hath an inheritance has over that. And therefore where no perpetuity is introduced, nor any inconveniency doth appear, there no rule of law is broken.

The reasons that do support the springing trust of a term as well as the springing use of an inheritance, are these.

1. Because it hath happened sometimes, and doth frequently, that men have no estates at all, but what consist in leases for years; now it were not only very severe, but (under favor) very absurd, to say that he who has no other estate but what consists in leases for years, shall be incapable to provide for the contingencies of his own family, though these are directly within his view and immediate prospect. And yet if that be the rule, so it must be; for I will put the case; a man who has no other estate but leases for years, chattels real, treats for the marriage of his son and thereupon it comes to this agreement: these leases shall be settled as a jointure for the wife, and provision for the children: says he, I am content, but how shall it be done? Why thus: you shall assign all these terms to John a Styles, in trust for yourself and your executors, if the marriage take no effect: but then, if it takes effect, to your son while he lives, to his wife after while she lives, with remainders over. I would have any one tell me whether this were a void limitation upon a marriage settlement: or if it be, what a strange absurdity is it, that a man shall settle it if the marriage take no effect, and shall not settle if the marriage happen.

2. Suppose the estate had been limited to Henry Howard and the heirs male of his body, till the death of Thomas without issue, then to

Charles, there it had been a void limitation to Charles: if then the addition of those words, if Thomas die without issue in the life of Henry, &c. have not mended the matter, then all that addition of words goes for nothing, which it is unreasonable and absurd to think it should.

3. Another thing there is, which I take to be unanswerable, and gather it from what fell from my Lord Chief Justice Pemberton; and when I can answer that case, I shall be able to answer myself very much for that which I am doing. Suppose the proviso had been thus penned, and if Thomas die without issue male, living Henry, so that the earldom of Arundel descend upon Henry, then the term of two hundred years limited to him and his issue, shall utterly cease and determine, but then a new term of two hundred years shall arise and be limited to the same trustees, for the benefit of Charles in tail. This he thinks might have been well enough, and attained the end and intention of the family, because then this would not be a remainder in tail upon a tail, but a new term created.

Pray let us so resolve cases here, that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference, why I may not raise a new springing trust upon the same term, as well as a new springing term upon the same trust; that is such a chicanery of law as will be laughed at all over the Christian world.

4. Another reason I go on is this; that the meanness of the consideration of a term for years, and of a chattel-interest, is not to be regarded: for whereas this will be no reason anywhere else; so I shall show you, that this reason, as to the remainder of a chattel-interest, is a reason that has been exploded out of Westminster Hall. There was a time indeed that this reason did so far prevail, that all the judges in the time of my Lord Chancellor Rich, did 6 Edvardi VI. deliver their opinions, that if a term for years be devised to one, provided that if the devisee die, living J. S. then to go to J. S. that remainder to J. S. is absolutely void, because such a chattel-interest of a term for years is less than a term for life, and the law will endure no limitation over. Now this being a reason against sense and nature, the world was not long governed by it, but in 10 Eliz. in Dyer, they began to hold the remainder was good by devise; and so 15 Eliz. seems to, and 19 Eliz. it was by the judges held to be good remainder; and that was the first time that an executory remainder of a term was held to be good. When the chancery did begin to see that the judges of the law did govern themselves by the reason of the thing, this court followed their opinion, the better to fix them in it, they allowed of bills by the remainder-man, to compel the devisee of the particular estate, to put in security that he in remainder should enjoy it according to the limitation. And for a great while so the practice stood, as they thought it might well, because of the resolution of the judges, as we have shown; but after this was seen to multiply the chancery suits, then they began to resolve that

there was no need of that way, but the executory remainder-man should enjoy it, and the devisee of the particular estate should have no power to bar it. Men began to presume upon the judges then, and thought if it were good as to remainders after estates for lives, it would be good also as to remainders upon estates-tail: that the judges would not endure, and that is so fixed a resolution, that no court of law or equity ever attempted to vreok [*sic*] in the world. Now then come we to this case, and if so be where it does not tend to a perpetuity, a chattel-interest will bear a remainder over, upon the same reason it will bear a remainder over upon a contingency, where that contingency doth wear out within the compass of a life, otherwise, it is only to say, it shall not, because it shall not: for there is no more inconveniences in the one than in the other.

Come we then, at last, to that which seems most to choke the plaintiff's title to this term, and that is the resolution in *Child and Bayly's Case;* for it is upon that judgment, it seems, all conveyances must stand or be shaken, and our decrees made. Now therefore I will take the liberty to see what that case is, and how the opinion of it ought to prevail in our case.

1. If *Child and Bayly's Case* be no more than as it is reported by Rolls, part 2d, fol. 119, then it is nothing to the purpose: a devise of a term to Dorothy for life, the remainder to William, and if he dies without issue, to Thomas, without saying, in the life of Thomas; and so it is within the common rule of a limitation of a term in tail, with remainder over, which cannot be good.

But if it be as Justice Jones has reported it, fol. 15, then it is as far as it can go, an authority; for it is there said to be, living Thomas. But the case, under favor, is not altogether as Mr. Justice Jones hath reported it neither; for I have seen a copy of the record upon this account; and, by the way, no book of law is so ill corrected, or so ill printed as that.

The true case is, as it is reported by Mr. Justice Crook; and with Mr. Justice Crook's report of it, doth my Lord Rolls agree, in his abridgment, title Devise, 612. There it is, a term of seventy-six years is devised to Dorothy for life, then to William and his assigns all the rest of the term, provided if William die without issue then living, then to Thomas; and this is in effect our present case; I agree it. But that which I have to say to this case is,

First, it must be observed, that the resolution there did go upon several reasons, which are not to be found in this case.

1. One reason was touched upon by my Lord Chief Baron, that William having the term to him and his assigns, there could be no remainder over to Thomas, of which words there is no notice taken by Mr. Justice Jones.

2. Dorothy the devisee for life, was executrix, and did assent and grant the lease to William, both which reasons my Lord Rolls doth lay hold upon, as material, to govern the case.

3. William might have assigned his interest, and then no remainder could take place, for the term was gone.

4. He might have had issue, and that issue might have assigned, and then it had put all out of doubt.

5. But the main reason of all, which makes me oppose it, ariseth out of the record, and is not taken notice of in either of the reports of Rolls, or Jones, or in Rolls' abridgment. The record of that case goes farther, for the record says: there was a farther limitation upon the death of Thomas without issue to go to the daughter, which was a plain affectation of a perpetuity to multiply contingencies. It further appears by the record, that the father's will was made the 10 of Eliz. Dorothy, the devisee for life, held it to the 24, and then she granted and assigned the term to William; he under that grant held it till the 31 of Eliz. and then re-granted it to his mother, and died; the mother held it till the 1 of R. James, and then she died; the assignees of the mother held it till 14 Jac. and then, and not till then, did Thomas, the younger son, set up a title to that estate; and before that time it appears by the record, there had been six several alienations of the term to purchasers, for a valuable consideration, and the term renewed for a valuable fine paid to the Lord. And we do wonder now, that after so long an acquiescence as from 10 Eliz. to 14 Jac. and after such successive assignments and transactions, that the judges began to lie hard upon Thomas, as to his interest in law, in the term, especially when the reasons given in the reports of the case, were legal inducements to guide their judgments, of which there are none in our case? But then,

Secondly, at last, allowing this case to be as full and direct an authority as is possible, and as they would wish, that rely upon it; then I say —

1. The resolution in *Child and Bayly's Case,* is a resolution that never had any resolution like it before nor since.

2. It is a resolution contradicted by some resolutions; and to show, that the resolution has been contradicted, there is —

1. The case of *Cotton and Heath*, which looks very like a contrary resolution; there is a term limited to A. for eighteen years, the remainder to B. for life, the remainder to the first issue of B. for life, this contingent upon a contingent was allowed to be good, because it would wear out in a short time. But

2. To come up more fully and closely to it, and show you, that I am bound by the resolutions of this court, there was a fuller and flatter case 21 Car. 2, in July 1669, between *Wood and Saunders*. The trust of a long lease is limited and declared thus: to the father for sixty years if he lived so long; then to the mother for sixty years, if she lived so long; then to John and his executors if he survived his father and mother; and if he died in their lifetime, having issue, then to his issue; but if he die without issue, living the father or mother, then the remainder to Edward in tail. John did die without issue, in the lifetime of the father and mother, and the question was, whether Edward

should take this remainder after their death? and it was resolved by my Lord Keeper Bridgeman, being assisted by Judge Twisden and Judge Rainsford, that the remainder to Edward was good, for the whole term had vested in John, if he had survived; yet the contingency never happening, and so wearing out in the compass of two lives in being, the remainder over to Edward might well be limited upon it.

Thus we see, that the same opinion which Sir Orlando Bridgeman held when he was a practiser, and drew these conveyances, upon which the question now ariseth, remained with him when he was the judge in this court, and kept the seals; and by the way, I think it is due to the memory of so great a man, whenever we speak of him, to mention him with great reverence and veneration for his learning and integrity.

Object. They will perhaps say, where will you stop if not at *Child and Bayly's Case?*

Answ. Where? why everywhere, where there is not any inconvenience, any danger of a perpetuity; and whenever you stop at the limitation of a fee upon a fee, there we will stop in the limitation of a term of years. No man ever yet said, a devise to a man and his heirs, and if he die without issue, living B. then to B. is a naughty remainder, that is *Pell's and Brown's Case.*

Now the *ultimum quod sit*, or the utmost limitation of a fee upon a fee, is not yet plainly determined, but it will be soon found out, if men shall set their wits on work to contrive by contingencies, to do that which the law has so long labored against, the thing will make itself evident, where it is inconvenient, and God forbid, but that mischief should be obviated and prevented.

I have done with the legal reasons of the case: it is fit for us here a little to observe the equitable reasons of it; and I think this deed is good both in law and equity; and the equity in this case is much stronger, and ought to sway a man very much to incline to the making good this settlement if he can. For,

1. It was prudence in the earl to take care, that when the honor descended upon Henry, a little better support should be given to Charles, who was the next man, and trod upon the heels of the inheritance.

2. Though it was always uncertain whether Thomas would die without issue, living Henry, yet it was morally certain that he would die without issue, and so the estate and honor come to the younger son: for it was with a careful circumspection always provided, that he should not marry till he should recover himself into such estate of body and mind, as might suit with the honor and dignity of the family.

3. It is a very hard thing for a son to tell his father, that the provision he has made for his younger brothers is void in law, but it is much harder for him to tell him so in chancery. And if such a provision be void, it had need be void with a vengeance; it had need be so clearly void, that it ought to be a prodigy if it be not submitted to.

Now where there is a perpetuity introduced, no cloud hanging over the estate but during a life, which is a common possibility where there

is no inconvenience in the earth, and where the authorities of this court concur to make it good: to say, all is void, and to say it here, I declare it, I know not how to do it. To run so counter to the judgment of that great man, my Lord Keeper Bridgeman, who hath advised this settlement; and when he was upon his oath in this place decreed it good. I confess his authority is too hard for me to resist, though I am assisted by such learned and able judges, and will pay as great a deference to their opinions as any man in the world shall.

If then this should not be void, there is no need for the merger by the assignment or the recovery to be considered in the case: for if so be this be a void limitation of the trust, and they who had notice of it, will palpably break it, they are bound by the rules of equity to make it good by making some reparation. Nay, which is more, if the heir enter upon the estate to defeat the trust, that very estate doth remain in equity infected with the trust; which was the case of my lord of Thomond; so also was the resolution in *Jackson and Jackson's Case:* so that to me the right appears clear, and the remedy seems to be difficult.

Therefore my present thoughts are, that the trust of this term was well limited to Charles, who ought to have the trust of the whole term decreed to him, and an account of the mean profits, for the time by past, and a recompense made to him from the duke and Marriot for the time to come. But I do not pay so little reverence to the company I am in, as to run down their solemn arguments and opinions upon my present sentiments; and therefore I do suspend the enrolment of any decree in this case, as yet: but I will give myself some time to consider, before I take any final resolution, seeing the lords the judges do differ from me in their opinions.

[On June 17, 1682, the case was reargued, and the Lord Chancellor gave judgment as follows: —]

Lord Nottingham, C. I am not sorry for the liberty that was taken at the bar to argue this over again, because I desired it should be so; for in truth I am not in love with my own opinion, and I have not taken all this time to consider of it, but with very great willingness to change it, if it were possible. I have as fair and as justifiable an opportunity to follow my own inclinations (if it be lawful for a judge to say he has any) as I could desire; for I cannot concur with the three chief judges, and make a decree that would be unexceptionable: but it is my decree, I must be saved by my own faith, and must not decree against my own conscience and reason.

It will be good for the satisfaction of the public in this case, to take notice how far the court is agreed in this case, and then see where they differ, and upon what grounds they differ; and whether anything that hath been said be a ground for the changing this opinion. The court agreed thus far

That in this case it is all one, the limitation of the trust of a term, or the limitation of the estate of a term, all depends upon one and the same reason. The court is likewise agreed (which I should have said first,

to despatch it out of the case, that it may not trouble the case at all) that the surrender of Marriot to the Duke of Norfolk, and the common recovery suffered by the duke, are of no use at all in this case. For if this limitation to Charles be good, then is that surrender and the recovery a breach of trust, and ought to be set aside in equity; so all the judges that assisted at the hearing of this cause agreed: if the limitation be not good, then there was no need at all of a surrender to bar it, nor of the common recovery to extinguish it.

But then we come to consider the limitation, and there it is agreed all along in point of law, that the measures of the limitations of the trust of a term, and the measures of the limitations of the estate of the term, are all one, and uniform here, and in other cases, and there is no difference at chancery or at common law, between the rules of the one and the rules of the other; what is good in one case, is good in the other. And therefore in this case the court is agreed to, that the limitations made in this settlement to Edward, &c. are all void, for they tend directly and plainly to perpetuities, for they are limitations of remainders of a term in gross after an estate-tail in that term, which commenceth to be a term in gross, when the contingency for Charles happens.

Thus far there is no difference of opinion: but whether the limitation to Charles, if Thomas die without issue, living Henry, whereby the honor of the earldom of Arundel descends upon Henry; I say, whether that be void too, is the great question of this case wherein we differ in our opinions.

It is said that is void too; and yet (sever it from the authority of *Child and Bayly's Case*, which I will speak to by and by) I would be glad to see some tolerable reason given why it should be so; for I agree it is a question in law here upon a trust, as it would be elsewhere upon an estate; and so the questions here, are both questions of law and equity. It was well said, and well allowed by all the judges, when they did allow the remainders of terms after estates-tail in those terms to be void. I shall not devise a term to a man in tail with remainders over; the judges have admirably well resolved in it, and the law is settled, (and *Matthew Manning's Case* did not stretch so far) because this would tend to a perpetuity.

Now, on the other side, I would fain know, when there is a case before the court, where the limitation doth not tend to a perpetuity, nor introduceth any visible inconvenience, what should hinder that from being good: for though if there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason; yet the bare limitation of the remainder after an estate-tail, which doth not tend to a perpetuity, that is not void. Why? because it is not? I dare not say so: see then the reasons why it is so. The reasons that I lie under the load of, and cannot shake off, are these: —

The law doth in many cases allow of a future contingent estate to be limited, where it will not allow a present remainder to be limited; and

that rule, well understood, goeth through the whole case. How do you make that out? thus: if a man have an estate limited to him, his heirs and assigns forever, (which is a fee-simple) but if he die without issue, living J. S. or in such a short time, then to J. D. though it be impossible to limit a remainder of a fee upon a fee, yet it is not impossible to limit a contingent fee upon a fee. And they that speak against this rule, do endeavor as much as they can to set aside the resolution of *Pell and Brown's Case*, which (under favor) was not the first case that was so resolved; for, as I said before, when I first delivered my opinion, it was resolved to be a good limitation. 10 Eliz. in the case of *Hinde and Lyon*, 3 Leonard, 64, which by the way is the best book of reports of the later ones that hath come out without authority. If that be so, then where a present remainder will not be allowed, a contingent one will. If a lease for years come to be limited in tail, the law allows not a present remainder to be limited thereupon, yet it will allow a future estate arising upon a contingency only, and that to wear out in a short time.

But what time? and where are the bounds of that contingency? you may limit, it seems, upon a contingency to happen in a life: what if it be limited, if such a one die without issue within twenty-one years, or one hundred years, or while Westminster-Hall stands? where will you stop if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it.

First of all, then, I would fain have any one answer me, where there is no inconvenience in this settlement, no tendency to a perpetuity in this limitation, and no rule of law broken by the conveyance, what should make this void? and no man can say that it doth break any rule of law, unless there be a tendency to a perpetuity, or a palpable inconvenience. Oh yes, terms are mere chattels, and are not in consideration of law so great as freeholds, or inheritances. These are words, and but words, there is not any real difference at all, but the reason of mankind will laugh at it: shall not a man have as much power over his lease as he has over his inheritance? if he have not, he shall be disabled to provide for the contingencies of his own family that are within his view and prospect, because it is but a lease for years, and not an inheritance of a freehold. There is that absurdity in it which is to me insuperable, nor is the case that was put, answered in any degree. A man that hath no estate but what consists in a lease for years, being to marry his son, settled this lease thus: in trust for himself in tail, till the marriage take effect; and if the marriage take effect while he lives, then in trust for the married couple; is this future limitation to the married couple good or bad? if any man say it is void, he overthrows I know not how many marriage settlements: if he say it is good, why is not a future estate in this case as good as in that, when there is no tendency to a perpetuity, no visible inconvenience?

All men are agreed, (and my Lord Chief Justice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I desire no better argument in the world to maintain my opinion, than that; for, says my Lord Chief Justice, suppose it had not been said thus; if Thomas die without issue, living Henry, then over to Charles; but thus, if it happens that Thomas die without issue in the life of Henry, &c. then this term shall cease, and there shall a new term arise and be created to vest in Charles in tail, and that had been wonderful well, and my lord of Arundel's intention might have taken effect for the younger son. This is such a subtilty as would pose the reason of all mankind: for I would have any man living open my understanding so far, as to give me a tolerable reason why there may not be as well a new springing trust upon the same term to go to Charles, upon that contingency, as a new springing lease upon the same trust: for the latter doth much more tend to a perpetuity than the former doth, I am bold to say it.

But I expect to hear it said from the bar, and it has been said often, the case of *Child and Bayly* is a great authority: so it is. But this I have to say to it, first, the point resolved in *Child and Bayly's Case* was never so resolved before, nor ever was there such a resolution since. *Pell and Brown's Case* was otherwise resolved, and has often been adjudged so since. In the next place, I will not take much pains to distinguish *Child and Bayly's Case* from this, though the word (assigns) and the grant of the remainder by the mother, who was executrix, are things that Rolls lays hold on as reasons for the judgment. But I know not why I may not, with reverence to the authority of that case, and the learning of those that adjudged it, take the same liberty as the judges in Westminster-Hall sometimes do, to deny a case that stands single and alone of itself. And I am of opinion the resolution in that case is not law, though there it came to be resolved upon very strange circumstances to support such a resolution; for the remainder of a term of seventy-six years is called in question when but fifteen years of it remained, and after the possession had shifted hands several times, and therefore I do not wonder that the consideration of equity swayed that case.

But I put it upon this point; pray consider, there is nothing in *Child and Bayly's Case* that doth tend to a perpetuity, nor anything in the settlement of the estate there, that could be called an inconvenience, nor any rule of law broken by the conveyance: but it is absolutely a resolution *quia volumus*. For it disagrees with all the other cases before and since; all which have been otherwise resolved; but it is a resolution, I say, merely because it is a resolution. And it is expressly contrary to *Wood and Saunder's Case*, which no art or reason can distinguish from our case or that. For here was that case which was clipped and minced at the bar, but never answered. *Wood and Saunder's Case* is this: to the husband for sixty years, if he lived so long; to the wife for sixty years, if she lived so long; then if John be living at the time of

the death of the father and mother, then to John; but if he die without issue, living father or mother, then to Edward. Suppose these words (living father or mother) had been out of the case, and it had been to John, and if he die without issue, to Edward, will any man doubt, but then the remainder over had been void, because it is a limitation after an express entail? How came it then to be adjudged good! because it was a remainder upon a contingency, that was to happen during two lives, which was but a short contingency, and the law might very well expect the happening of it? Now, that is this case; nay, ours is much stronger: for here it is only during one life, there were two.

The case of *Cotton and Heath* in Rolls comes up to this; a term is devised to A. for eighteen years; the remainder to B. for life, the remainder to the first issue male of B. which is a contingent estate after a contingency, and yet adjudged good, because the happening of the contingency was to be expected in so short a time. Now that case was adjudged by my Lord Keeper Coventry, Mr. Justice Jones, Mr. Justice Crook, and Mr. Justice Berkley, as *Wood and Saunder's Case* was by my Lord Keeper Bridgman, Mr. Justice Twisden, and Mr. Justice Rainsford; so that however I may seem to be single in my opinion, having the misfortune to differ from the three learned judges who assisted me, yet I take myself to be supported by seven opinions in these two cases I have cited.

If then this be so, that here is a conveyance made which breaks no rules of law, introduceth no visible inconvenience, savors not of perpetuity, tends to no ill example, why this should be void only, because it is a lease for years, there is no sense in that.

Now if Charles Howard's estate be good in law, it is ten times better in equity. For it is worth the considering, that this limitation upon this contingency happening, (as it hath, God be thanked) was the considerate desire of the family, the circumstances whereof required consideration, and this settlement was the result of it, made with the best advice they could procure, and is as prudent a provision as could be made. For the son now to tell his father that the provision that he had made for his younger brother is void, is hard in any case at law; but it is much harder in chancery, for there no conveyance is ever to be set aside, where it can be supported by a reasonable construction, and here must be an unreasonable one to overthrow it.

I take it then to be good both in law and equity; and if I could alter my opinion, I would not be ashamed to retract it; for I am as other men are, and have my partialities as other men have. When all this is done, I am at the bar desired to consider further of this case: I would do so, if I could justify it; but expedition is as much the right of the subject, as justice is, and I am bound by Magna Charta, *nulli negari, nulli differre justitiam.* I have taken as much pains and time as I could to be informed; I cannot help it if wiser men than I be of another opinion; but every man must be saved by his own faith, and I must discharge my own conscience.

I have made several decrees since I have had the honor to sit in this place, which have been reversed in another place, and yet I was not ashamed to make them, nor sorry when they were reversed by others. And I assure you, I shall not be sorry if this decree which I do make in this case be reversed too; yet I am obliged to pronounce it, by my oath and by my conscience. For I cannot adjourn a case for difficulty out of an English court of equity into the parliament; there never was an adjournment *propter difficultatem*, but out of a court of law where the proceedings are in Latin. The proceedings here upon record are in English, and can no way now come into parliament, but by way of appeal, to redress the error in the decree. I know I am very likely to err, for I pretend not to be infallible; but that is a thing I cannot help. Upon the whole matter, I am under a constraint, and under an obligation which I cannot resist. A man behaves himself very ill in such a place as this, that he needs to make apologies for what he does; I will not do it. I must decree for the plaintiff in this case, and my decree is this.

That the plaintiff shall enjoy this barony for the residue of the term of two hundred years; the defendant shall make him a conveyance accordingly, because he extinguished the trust in the other, and the term contrary to both law and reason, by the merger and surrender, and common recovery. And that the defendants do account with the plaintiff for the profits of the premises by them or any of them received since the death of the said Duke Thomas, and which they or any of them might have received without wilful default; and that it be referred to Sir Lacon William Child, Knight, one of the masters of the court, to take the said account, and to make unto the defendants all just allowances; and what the said master shall certify due, the said defendants are to pay unto the plaintiffs, according to the master's report herein to be made: and that the defendants shall forthwith deliver the possession of the premises to the plaintiff, and that the plaintiff shall hold and enjoy the said Barony of Grostock, with the lands and tenements thereunto belonging, for the residue of the said term of two hundred years, against the defendants, and all claiming by, from, or under them. And it is further ordered and decreed, that the said defendants do seal and execute such a conveyance of the said term to the plaintiff as the master shall approve of, in case the parties cannot agree to the same; but the defendants are not to pay any costs of the suit.[1]

[1] This decree of LORD CHANCELLOR NOTTINGHAM was reversed on bill of review by LORD KEEPER NORTH, May 15, 1683; but on appeal to the House of Lords, the decree of the Lord Keeper was, June 19, 1685, reversed, and the decree of the Lord Chancellor affirmed (3 Ch. Cas. 53, 54).

LLOYD *v.* CAREW.

HOUSE OF LORDS. 1697.

[*Reported Show. P. C.* 137.]

APPEAL from a decree of dismission in chancery. The case was thus: Rice Tannott died seised in fee of several lands in the several counties of Salop, Denbigh and Montgomery, leaving three daughters and co-heirs, Mary, Penelope, and Susan. Susan married Sidney Godolphin, one of the present appellants. In July, 1674, Mary and Penelope, in consideration of £4000 paid to the said Mary by Richard Carew, Esq.; and in consideration of a marriage to be had, and which was afterwards had, between Penelope and the said Richard Carew, by lease and release, convey all those their two parts of the said lands in Denbigh, Salop, and Montgomery, to trustees and their heirs, to the use of Richard Carew for life, then to Penelope for life for her jointure, then to the said trustees and their heirs, during the lives of Richard and Penelope, to preserve contingent remainders; then to the first and other sons of Richard and Penelope in tail male successively: and in default of issue male, to the daughters of Richard and Penelope in tail: and in default of such issue, as to one moiety of the said two parts, to the first and other sons of the said Penelope by any other husband in tail, the remainder of all and singular the premises to the said Richard Carew and his heirs forever, subject to this proviso, "that if it should happen that no issue of the said Richard, upon the body of the said Penelope, should be living at the decease of the survivor of them, and the heirs of the said Penelope should within twelve months after the decease of the survivor of the said Richard and Penelope dying without issue as aforesaid, pay to the heirs or assigns of the said Richard Carew the sum of £4000, that then the remainder in fee-simple so limited, to the said Richard Carew and his heirs should cease; and that then, and from thenceforth, the premises should remain to the use of the right heirs of the said Penelope forever."

After this Mary intermarried with the appellant Sir Evan Lloyd, and a partition was made of the premises, and the same had been enjoyed accordingly ever since, and Mr. Carew and his lady levied a fine to Mr. Godolphin and his lady of his part; who did thereupon by their deed dated 23 Sept. 1676, covenant to levy a fine of Mr. Carew's two parts, to such uses as he and his lady should limit and appoint, but have not yet levied the said fine.

Richard Carew and Penelope his wife, to avoid all controversies that might happen, whereby the estate of the said Richard Carew, or his heirs, might be questioned or encumbered by the heirs of Penelope; and to the end to extinguish and destroy and bar all such estate, right, title, equitable or other interest, as the said Penelope then had, or her

issue and heirs might have or claim to the same, by any power, settlement, or condition, on payment of £4000 or otherwise, to the heirs of Richard Carew, by the heirs of the said Penelope; and for the settling of the same on the said Richard Carew and his heirs, did in Michaelmas Term, 1681, levy a fine of the share and part allotted to them, and by deed of 10 Dec. 1681, declare that the said fine should be to the use of the said Richard for life, remainder to Penelope for life, the remainder to the said Richard Carew, his heirs and assigns forever: and do further declare, that the fine agreed to be levied by the appellants Sidney Godolphin and Susan his wife, by their deed dated the 23 Sept. 1676, should be to the same uses, and then direct the trustees by the first settlement to convey to those uses.

Penelope died without issue in 1690. Richard Carew made his will in August, 1691, and devised the said lands to Sir John Carew, Baronet, his brother, subject to pay all his debts and legacies, and made Sir John Carew his executor.

In December, 1691, Richard Carew died without issue, and Sir John Carew entered, and was seised and possessed of the premises, and paid £4855 for the debts of Richard Carew.

Sir John Carew died, and the respondent, Sir Richard Carew, an infant, is his son, heir, and executor.

The appellants, Mary and Susan, claiming the lands as heirs to Penelope, by virtue of the said proviso in the first settlement, upon payment of the £4000 exhibited their bill in Chancery to compel the trustees to convey the estate to them upon such payment.

Upon hearing of this cause on bill and answer, the court ordered a state of the case to be drawn, which was as above; and afterwards the court [Sir John Somers, C.], assisted by the Chief Justice of the Common Pleas [Sir George Treby] and Mr. Justice Rooksby, seeing no cause to relieve the plaintiffs, dismissed their bill.

And now it was argued on behalf of the appellants, that such dismission ought to be set aside; and amongst other things, it was insisted on in favor of the appeal, that this proviso was not void; that it was within the reason of the contingent limitations allowed by the late Lord Chancellor Nottingham in the case of the Duke of Norfolk, and there were quoted several paragraphs in the argument made by the said Lord Chancellor, as that future interests, springing trusts, or trusts executory, remainders that are to emerge or arise upon contingency, are quite out of the rules and reasons of perpetuities; nay, out of the reason, upon which the policy of the law is founded in those cases, especially if they be not of remote or long consideration, but such as by a natural and easy interpretation will speedily wear out, and so things come to the right channel again: that though there can be no remainders limited after a fee-simple, yet there may be a contingent fee-simple arise out of the first fee; that the *ultimum quod sit*, or the utmost limitation of a fee upon a fee, is not yet plainly determined; that though it be impossible to limit a remainder of a fee upon a fee,

yet 't is not impossible to limit a contingent fee upon a fee; that no conveyance is ever to be set aside in Chancery, where it can be supported by a reasonable construction, especially where 't is a family settlement. Then these paragraphs were applied; and further urged, that there could not in reason be any difference between a contingency to happen during life or lives, or within one year afterwards; that the true reason of such opinions which allowed them, if happening within the time of the parties' lives, or upon their deceases, was because no inconvenience could be apprehended thereby; and the same reason will hold to one year afterwards; and the true rule is to fix limits and boundaries to such limitations, when so made, as that they prove inconvenient, and not otherwise: that this limitation upon this contingency happening, was the considerate intention of the family, the circumstances whereof required consideration, and this settlement was the result of it, and made by good advice: that the fine could not bar the benefit of this proviso; for that the same never was, nor ever could be in Penelope, who levied the fine.

As to the pretence, that if the appellants were relieved, Richard Carew who married Penelope, would have no portion with her. 'T was answered, that that could not alter the case; the agreement and intention of the parties being the most considerable matter; and besides, Richard enjoyed the estate during his life without impeachment of waste. And as to the debts, 't was answered, that those were no ingredients in the question; however there would be £4000 paid towards it, and the personal estate was more than enough to pay the residue. For which, and other reasons, 't was prayed that the dismission might be reversed.

On the other side it was insisted on with the decree, 1, that the limitation by the settlement in July, 1674, to the heirs of Penelope, upon payment of £4000 by them to the heirs of Richard Carew, within twelve months after the death of Richard and Penelope, without issue, at the time of the decease of the survivor of them, is a void limitation, the fee-simple being before limited to Richard and his heirs, and so not capable of a further limitation, unless upon a contingency to happen in the life of one or more persons in being, at the time of the settlement; which is the furthest that the judges have ever yet gone, in allowing these contingent limitations upon a fee; and which were the bounds set to these limitations by the late Lord Chancellor Nottingham, in the case of the Duke of Norfolk; that though there were such expressions as had been read on the other side, yet the bounds set by him to these limitations, were only dependent upon life or lives in being, and never as yet went any further: and if they should be extended, and allowed to be good upon contingencies to happen within twelve months after the death of one or more persons, they may be as well allowed upon contingencies to happen within a thousand years; by which all the mischiefs, that are the necessary consequents of perpetuities, which have been so industriously avoided in all ages, will be

let in; and the owner of a fee-simple thus clogged, would be no more capable of providing for the necessities and accidents of his family, then a bare tenant for life.

2. If this limitation were good, 't was urged, that the estate limited to the heirs of Penelope was virtually in her, and her heirs must claim by descent from her, and not as purchasers; and by consequence this estate is effectually barred by the fine of Penelope: the design of limiting this power to the heirs, not being to exclude the ancestor; but because the power could not in its nature be executed until after the decease of the ancestor, it being to take effect upon a contingency, that could not happen till after that time; and this bill and appeal was not only to have the said Richard Carew, who married Penelope, to have not one farthing portion with his wife, but to make the now respondent Sir Richard Carew, to lose the £4855 which his father Sir John Carew paid, as charged on the lands in question. For which reasons, and many others well urged about the mischief and danger of perpetuities, and their increase of late years, to the entangling and ruin of many families, it was prayed that the decree of dismission might be affirmed, but the same was reversed.

SCATTERWOOD *v.* EDGE.

COMMON PLEAS. 1699.

[*Reported* 1 *Salk.* 229.]

IN ejectment a special verdict was found, viz. Robert Edge devised to trustees for eleven years, and then to the first son of A. and the heirs males of his body, and so on to the second, third, &c. sons in tail male, "provided they the said sons shall take on them my surname; and in case they or their heirs refuse to take my surname, or die without issue, then I devise my land to the first son of B. in tail male, provided he take my surname; and if he refuse, or die without issue, then to the right heirs of the devisor." A. had no son at the time of the devise, and died without issue; and B. had a son who was living at the time of the devise, who took the surname of the devisor. The whole court agreed, 1st, that the devise to the first son of A. was not a contingent remainder, but by way of executory devise, because the precedent estate is for years, which cannot support a remainder; for a contingent remainder can never depend on a term of years, because of the abeyance of the freehold; nor can it be limited after a fee, because after such a disposal nothing remains in the owner to limit. *Et per* POWELL, a devise to the first son of A. having none at that time, is void because it is by way of a present devise, and the devisee is not *in esse;* but a devise to the first son of A. when he shall have

one, is good, for that is only a future devise, and no inconvenience, for the inheritance descends in the mean time. 2dly, they held that an executory estate, to rise within the compass of a reasonable time, is good; that 20, nay 30 years, has been thought a reasonable time. So is the compass of a life or lives; for let the lives be never so many, there must be a survivor, and so it is but the length of that life; [for Twisden used to say, the candles were all lighted at once,[1]] but they were not for going one step farther, because these limitations make estates unalienable, every executory devise being a perpetuity as far as it goes, that is to say, an estate unalienable, though all mankind join in the conveyance. And as to the principal case, Blencow, J., held the devise to the first son of A. to be future; for he supposed the testator knew A. had no son, and that the rather, because he does not name him. Powell, J. There are three sorts of executory estates, one where the devisor parts with his whole fee-simple, but upon some contingency qualifies that disposition, and limits another fee upon that contingency, which is altogether new in law, as appears by 1 Inst. 18. A fee cannot be limited upon a fee. *Vide* 1 Ro. 825, 826; 1 Cro. *Pells and Brown*. The second sort is, where he gives a future estate to arise upon a contingency, and does not part with the fee at present, but retains it; these are not against law; for by common law one might devise that his executor should sell his land, and in such case the vendee is in by the will, and the fee descends to the heir in the mean time: for this sort *vide* 2 Leon. 11; 3 Leon. 64; Cro. El. 833; Mo. 644; 2 Ro. 793; Raym. 82. A third sort of executory devises is of terms, which are well settled in *Matth. Manning's Case:* it is dangerous to extend the boundary of these executory devises, which at present is a life or lives. A devise to an infant *in ventre sa mere*, by the better opinions, though various, is not good. *Vide* 11 H. 6, 13; Bro. Devise, 32; 1 Ro. 609, 610; Dyer, 303, 304, 342; Mo. 127, 177, 634; 2 Bulst. 272; 1 Ro. Rep. 110; Litt. 255. But I am of opinion it is good; for he, taking notice that the devisee is *in ventre*, must intend a future devise; but a devise to A.'s first son does not import notice in the devisor that A. has no son: it may as well be said a devise to the heirs of J. S., a person living, is good, because the testator knew he was alive, and therefore meant a future devise. The question here is, Whether the precedent term for eleven years makes a difference? I hold not, because it is an original devise *per verba de præsenti*, and so differs from 1 Raym. 12; 2 Mod. 292. But had it been to the first son to be begotten, it had been otherwise. Lastly, he held that the devise to the first son of B., who was born and *in esse* at the time, was good; and as to the objection, that the devise to the first son of A. was a condition precedent, and so that failing, all fails, (*vide* 1 Inst. 218) he held, it was not a precedent condition, but part of the limitation. Treby, C. J. If the devise to the first son of A. be good, then the

[1] This passage is not in the original edition of Salkeld. See *Love* v. *Wyndham*, 1 Mod. 50, 54. — Ed.

devise to the first son of B. is not good; but if that to the first son of A. be bad, then this to the first son of B. is good. Had the first son of A. been before the court, the judgment must have been against him, because as a remainder it was void, and as an executory devise it was void; for these are either present or future: if present, the party must be *in esse et capax* at the time, or all is void; like a devise to the right heirs of J. S. who is living; this is a present devise, and therefore not like the case of an infant *in ventre sa mere:* where future, they must arise within the compass of a life; no longer time has yet been allowed: and he was not for prolonging the time in favor of these inconvenient estates. 2dly, he held the devise to the first son of A. was not a precedent condition, but a precedent estate attended with these limitations. Judgment was given for the defendant, and afterwards affirmed in B. R.[1]

LOW *v.* BURRON.

CHANCERY. 1734.

[*Reported* 3 *P. Wms.* 262.]

THE bill was for an account of the rents and profits of divers messuages and lands in Warrington, in Lancashire, on this case: John Casson, seised of an estate for three lives in the premises, by his will dated the 12th of January, 1684, devised them to his daughter Mary Mollineux for life, remainder to her issue male, and for want of such, remainder to one Low, under whom the plaintiff claimed. Mary Mollineux, by lease and release, conveyed the premises, in consideration of her marriage with Edward Burron, to the use of herself and her intended husband, and the heirs of their bodies, remainder to the heirs of her husband Burron. In 1705, Mary died without issue, and the plaintiff claiming under the person in remainder, now brought this bill for an account of the rents and profits.

The questions were, first, One having an estate for three lives, and devising it to A. in tail, remainder to B., whether this remainder was good? 2dly, supposing it to be good, whether A. by such lease and release could bar it?

[1] See s. c. *sub nom. Scattergood* v. *Edge*, 12 Mod. 278, where TREBY, C. J., is reported to have said: "These executory devises had not been long countenanced when the judges repented them; and if it were to be done again, it would never prevail; and therefore there are bounds set to them, viz. a life or lives in being; and further they shall never go, by my consent, at law, let chancery do as they please" (p. 287).

On error in the King's Bench LORD HOLT was of opinion "that the time in which an executory devise was to arise was not then settled." See *Gore* v. *Gore*, W. Kel. 254, 259.

As to the first it was said, and so agreed by the court, that the limitation of an estate *pur autre vie* to A. and the heirs of his body, makes no estate tail in A. for all estates-tail are estates of inheritance, to which dower is incident, and must be within the Statute *De Donis;* whereas in this kind of estate, which is in no inheritance, there can be no dower, neither is it within the Statute, but a descendible freehold only.

Also the Lord Chancellor [Lord Talbot] held plainly, that this was a good remainder to B. on A.'s death without issue, it being no more than a description, who should take as special occupants during the lives of these three *cestui que vies.* As if the grantor had said, "instead of a wandering right of *general* occupancy, I do appoint, that after the death of A. the grantee, they who shall happen to be heirs of the body of A. shall be *special* occupants of the premises; and if there shall be no issue of the body of A. then B. and his heirs shall be the special occupants thereof." And that here can be no danger of a perpetuity; for all these estates will determine on the expiration of the three lives. So, if instead of three, there had been twenty lives, all spending at the same time, all the candles lighted up at once, it would have been good; for, in effect, it is only for one life, (viz.) that which shall happen to be the survivor. For which reason, it were very improper to call this an estate-tail, since at that rate it would not be liable to a forfeiture, or punishable for waste, the contrary whereof is true.

2dly, the Lord Chancellor said, that though by a lease, or by a lease and release, A. might bar the heirs of his body, as in some respects claiming under him, yet he inclined to think A. could not bar the remainder over to B. who was in the nature of a purchaser, and would be no way subject to the encumbrances of A. any more than if the estate *pur autre vie* had been limited to A. for life, remainder to B. for life; in which case plainly A. could not bar B. especially by this conveyance of lease and release, which never transfers more than may lawfully pass: whereas the conveying away or barring the remainder limited to B. (admitting it to have been a good remainder) is doing a wrong to B. and depriving him of an estate, which was before lawfully vested in him. Nay, indeed, it seemed to him, as if no act which A. could do, would be capable of barring this limitation over to B. in regard there could be no common recovery suffered thereof, it being only an estate for lives; and his Lordship said, that this (as he remembered) was determined in the case of Sir Hardolph Wasteneys in the House of Lords, upon an appeal from this court.

But notwithstanding all this, yet, it appearing that the right of the plaintiff, and of those under whom he claimed, had accrued so long since as the year 1705, now near thirty years ago, during all which time the defendant's possession had been unmolested, and the Statute of Limitations being pleaded, (though it was urged, that the plaintiff had not the lease in his possession, and that the defendant in his plea had

set forth, that the lease had been renewed: and though it was moreover insisted, that however the plaintiff might be disabled from bringing an ejectment, he might yet bring a bill in equity;) the LORD CHANCELLOR declared, he would grant no relief in the case of so stale a demand, and therefore allowed the plea.

STEPHENS *v.* STEPHENS.

CHANCERY. 1736.

[*Reported Cas. temp. Talb.* 228.]

THERE were five causes which were heard together by the late LORD CHANCELLOR KING; and upon the hearing he directed a case to be stated, and referred to the judges of the King's Bench for their opinion; and it now came back for the judgment of the court, upon the judges' certificate; upon reading of which, the present LORD CHANCELLOR [LORD TALBOT] was pleased to decree according to it, and expressed his satisfaction with it, as agreeing perfectly with his own sentiments; and said, he hoped it would be for the future a leading case in the determinations of all questions of this kind. The case stated, and the opinion of the judges, were as follow: —

Sir William Stephens being seised of the several messuages, lands and tenements hereinafter mentioned, made his will the 15th day of February 1712, whereby (*inter alia*) he made the several devises in the words following: "Item, I give, devise and bequeath unto my grandson William Stephens, after the decease of my said wife dame Susanna Stephens, all those my messuages, lands, tenements and hereditaments, situate, lying, and being in Deptford in the county of Kent, and by deed settled by my said wife on me, my heirs and assigns, to hold the same to my said grandson William Stephens, his heirs and assigns forever. Item, I give, devise and bequeath to my said grandson William Stephens all my freehold estates, messuages, lands, tenements, hereditaments and premises in the parish of St. Mary Magdalen, Bermondsea, in the county of Surry, situate and being in Rotherhith Wall, East Lane, St. Mary Magdalen Court-yard, and elsewhere in the said parish of St. Mary Magdalen, Bermondsea; and also all those my freehold messuages, lands, tenements, hereditaments and premises in the parish of St. Olave in Southwark, and elsewhere in the county of Surry; and also all my freehold messuages, lands, tenements and hereditaments in the county of Essex, to hold my said freehold messuages, lands, tenements, hereditaments and premises to my said grandson William Stephens, his heirs and assigns forever: but in case my said grandson William Stephens shall happen to die and depart this life before he attains his age of twenty-one years, then I give and bequeath

to my grandson Thomas Stephens all and every my messuages, lands and hereditaments before mentioned, as well those in the parishes of St. Mary Magdalen, Bermondsea, and St. Olave, in Southwark, as those in the counties of Essex and Kent, to hold the same to my said grandson Thomas Stephens, his heirs and assigns forever: but in case my said grandson Thomas Stephens shall happen to die and depart this life before he attains his age of twenty-one years, then I give and bequeath all my said freehold messuages, tenements, hereditaments and premises whatsoever before mentioned to such other son of the body of my daughter Mary Stephens, by my son-in-law Thomas Stephens, as shall happen to attain his age of twenty-one years, his heirs and assigns forever; the elder of such sons to take place before the younger, one after another in order and course as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the several and respective body and bodies of all and every such son and sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, then I give and bequeath my aforesaid freehold estates, messuages, lands, tenements and hereditaments to all and every the daughter and daughters of my said son Thomas Stephens on the body of my said daughter to be begotten, and to the heirs of the body and bodies of all and every the said daughter and daughters, as tenants in common, and not as jointenants; and for want of such issue, then I give, devise and bequeath my aforesaid freehold estates, messuages, lands, tenements and hereditaments to my brother Sir Richard Stephens, to hold the said freehold messuages, lands, tenements and hereditaments to the said Sir Richard Stephens, his heirs and assigns forever. Item, all the rest and residue of my estate, real and personal, goods, chattels, rings, jewels, plate, money and money's worth whatsoever and wheresoever not hereby before bequeathed, I give and bequeath the same to my said son Thomas Stephens, his heirs, executors, administrators and assigns forever." And the said testator, by his said will, made his said son in-law Thomas Stephens sole executor thereof. And afterwards (to wit) on or about the 15th day of March following died, leaving dame Mary, the wife of Thomas Stephens, his daughter and heir, and leaving two grandsons, William and Thomas, living at the time of his death, and no granddaughter. On the 18th of May 1713, Susan, the daughter of Thomas Stephens and Mary his wife, was born, and is still living; the said Thomas Stephens the grandson died without issue, and under the age of twenty-one years, the 24th day of October 1714; and the said William Stephens, the other grandson, died the 14th day of September 1718, without issue, and under the age of twenty-one years; Mary Stephens, another daughter of the said Thomas Stephens and Mary his wife, was born the 14th of March 1719, and died without issue and under age the 26th of October 1722; Sarah Stephens, another daughter of the said Thomas Stephens and Mary his wife, was born the 13th of November 1721, and is yet living; Mary Stephens, another daughter

of the said Thomas Stephens and Mary his wife, was born the 15th of February 1722, and died without issue and under age the 26th of April 1723; Thomas Stephens, one of the parties in this suit, son of the said Sir Thomas Stephens and Mary his wife, was born the 12th day of January 1727, and is still living; Sir Richard Stephens, the said testator's brother, mentioned in his will, is still living: the said Thomas Stephens claims title to the premises as residuary devisee of the said testator; and the said dame Mary his wife lays claim thereto as heir at law to the said William Stephens the testator; and the said other parties likewise claim title thereto under the said testator's will; Susan Stephens, the plaintiff in the original cause, since the hearing the said causes (to wit) the 14th of April 1734, died without issue and under age; and on the 6th of August following an order was obtained upon the petition of all the surviving parties, that the case should be made agreeable to the fact, as it now stands since her death, and that the judges of the Court of King's Bench be then desired to give their opinion on this question, what estate, right or interest, either in the present or in contingency any of the said parties have in or to the lands in question, or any part thereof?

The judges of the King's Bench certified their opinion as follows: we have heard counsel for all the parties, and maturely considered the case upon which the question is raised and referred to us; and the principal point appears to be, whether the devise made by the will in these words, viz. "And in case my said grandson Thomas Stephens shall die before he attains his age of twenty-one years, then I give all my said freehold estates, &c. to such other sons of the body of my said daughter Mary Stephens, by my son-in-law Thomas Stephens, as shall happen to attain his age of twenty-one years, his heirs and assigns forever," be good by way of executory devise? As to which we do not find any case wherein an executory devise of a freehold hath been held good, which hath suspended the vesting of the estate until a son unborn should attain his age of twenty-one years, except the case of *Taylor and Bydall*, adjudged upon a special verdict in the Court of Common Pleas, Hill. 29 & 30 Car. 2, and reported in 2 Mod. 289. That resolution appeared in every view of it to be so considerable in the present case, that we caused the record to be searched, and find it to agree in the material parts thereof with the printed report: and therefore, however unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors; yet upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation will not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity; and that this construction will make the testator's whole disposition take effect, which otherwise would be defeated; we are of opinion, that the devise before mentioned may be good by way of executory devise.

The consequence whereof is, that all the subsequent limitations will be good; the estate will vest in Thomas, the son now living, when he shall attain the age of twenty-one years in tail male, according to the clause directing the order of succession between the sons to be born; if Thomas the son, now living, should happen to die before his age of twenty-one years, and the testator's daughter dame Mary Stephens should have any other son by Sir Thomas Stephens, then the estate will go over to him when he shall attain his age of twenty-one years, in like manner as it would have vested in Thomas; if Thomas the son should die before the age of twenty-one years, and dame Mary should have no other son by Sir Thomas Stephens who should attain his age of twenty-one years, then his estate will go over to Sarah the daughter, and all other daughters of the said dame Mary by Sir Thomas, as tenants in common in tail, with remainder over to Richard Stephens the testator's brother in fee: but in case Thomas the son should die before the age of twenty-one, and Sarah the daughter should then be dead without issue, and there should be no other son of dame Mary who should attain the age of twenty-one years, or any other daughter hereinafter born of their bodies, then the estate will go over to the said Sir Richard Stephens, by virtue of the last remainder to him in fee. As to the profits of the estate received since the death of William the grandson, or to be received until it shall vest in any one person by force of the said executory devise, or shall go over to the remainder-man, we conceive that they belong to Sir Thomas Stephens by virtue of the residuary devise in the will, as an interest in the testator's real estate not before bequeathed or disposed of by his will.

HARDWICKE, E. PROBYN,
F. PAGE, W. LEE.

JEE *v.* AUDLEY.

CHANCERY. 1787.

[*Reported* 1 *Cox*, 324.]

EDWARD AUDLEY, by his will, bequeathed as follows, "Also my will is that £1000 shall be placed out at interest during the life of my wife, which interest I give her during her life, and at her death I give the said £1000 unto my niece Mary Hall and the issue of her body lawfully begotten, and to be begotten, and in default of such issue I give the said £1000 to be equally divided between the daughters *then* living of my kinsman John Jee and his wife Elizabeth Jee."

It appeared that John Jee and Elizabeth Jee were living at the time of the death of the testator, had four daughters and no son, and were of a very advanced age. Mary Hall was unmarried and of the age of

about 40; the wife was dead. The present bill was filed by the four daughters of John and Elizabeth Jee to have the £1000 secured for their benefit upon the event of the said Mary Hall dying without leaving children. And the question was, whether the limitation to the daughters of John and Elizabeth Jee was not void as being too remote; and to prove it so, it was said that this was to take effect on a general failure of issue of Mary Hall; and though it was to the daughters of John and Elizabeth Jee, yet it was not confined to the daughters living at the death of the testator, and consequently it might extend to after-born daughters, in which case it would not be within the limit of a life or lives in being and 21 years afterwards, beyond which time an executory devise is void.

On the other side it was said, that though the late cases had decided that on a gift to children generally, such children as should be living at the time of the distribution of the fund should be let in, yet it would be very hard to adhere to such a rule of construction so rigidly, as to defeat the evident intention of the testator in this case, especially as there was no real possibility of John and Elizabeth Jee having children after the testator's death, they being then 70 years old; that if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases, which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give an effect to words which would totally defeat such intention.

The cases mentioned were *Pleydell* v. *Pleydell*, 1 P. W. 748. *Forth* v. *Chapman*, 1 P. W. 663. *Lamb* v. *Archer*, Salk. 225. *Rachel's Case*, cited 2 Vern. 60. *Smith* v. *Cleaver*, 2 Vern. 38, 59. Pollex. 38. *Atkinson* v. *Hutchinson*, 3 P. W. 258. *Wood* v. *Saunders*, Pollex. 35. *Hughes* v. *Sayer*, 1 P. W. 534. *Cook* v. *Cook*, 2 Vern. 545. *Horsley* v. *Chaloner*, 2 Vez. 83. *Coleman* v. *Seymour*, 1 Vez. 209. *Ellison* v. *Airy*, 1 Vez. 111.

Master of the Rolls. [Sir Lloyd Kenyon.] Several cases determined by Lord Northington, Lord Camden, and the present Chancellor, have settled that children born after the death of the testator shall take a share in these cases; the difference is, where there is an immediate devise, and where there is an interest in remainder: in the former case the children living at the testator's death only shall take: in the latter those who are living at the time the interest vests in possession; and this being now a settled principle, I shall not strain to serve an intention at the expense of removing the landmarks of the law; it is of infinite importance to abide by decided cases, and perhaps more so on this subject than any other. The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and 21 years or 9 or 10 months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the *Duke of Norfolk's Case* to the present: it is grown reverend by age, and is not now

to be broken in upon; I am desired to do in this case something which I do not feel myself at liberty to do, namely to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment, and introductive of the greatest inconvenience to give a latitude to such sort of conjecture. Another thing pressed upon me, is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so. Then must this limitation, if at all, *necessarily* take place within the limits prescribed by law? The words are "in default of such issue I give the said £1000 to be equally divided between the daughters *then* living of John Jee and Elizabeth his wife." If it had been to "daughters now living," or "who should be living at the time of my death," it would have been very good; but as it stands, this limitation may take in after-born daughters; this point is clearly settled by *Ellison* v. *Airey*, and the effect of law on such limitation cannot make any difference in construing such intention. If then this will extended to after-born daughters, is it within the rules of law? Most certainly not, because John and Elizabeth Jee might have children born ten years after the testator's death, and then Mary Hall might die without issue 50 years afterwards; in which case it would evidently transgress the rules prescribed. I am of opinion therefore, though the testator might possibly mean to restrain the limitation to the children who should be living at the time of the death, I cannot, consistently with decided cases, construe it in such restrained sense, but must intend it to take in after-born children. This therefore not being within the rules of law, and as I cannot judge upon subsequent events, I think the limitation void. Therefore dismiss the bill, but without costs.[1]

[1] LENG *v.* HODGES.

CHANCERY. 1822.

[*Reported Jac.* 585.]

UNDER the will of Charles Leng, and the decree and several orders made in this cause, the defendant Mary, the wife of Thomas Bailey, was entitled to the dividends of a sum standing in the name of the Accountant-General, which, in the event of her dying without leaving any child or children who should arrive at the age of twenty-one, was to devolve upon the plaintiffs. She had had two children who died young, and she was now of the age of sixty-nine years. The plaintiffs having agreed with the defendants Thomas Bailey and his wife for the purchase of the life-interest of the latter, a petition was presented praying a transfer of the fund in question to them.

Mr. Roupell, in support of the petition, mentioned that orders had frequently been made for transfers of sums, the right to which depended on the contingency of a female dying without issue, in cases where she was of an advanced age.

THE MASTER OF THE ROLLS said, that orders of that description had sometimes been made, upon the parties giving security to refund the money in the event of any children being born; but he thought that the court would not venture to act upon

LONG *v.* BLACKALL.

KING'S BENCH. 1797.

[*Reported* 7 *T. R.* 100.]

A CASE sent from the Court of Chancery for the opinion of the judges of this court stated that George Blackall being possessed of a certain messuage and premises in Great Hazeley in the county of Oxford, held by lease for years under the Dean and Canons of Windsor, by will dated 23d April 1709 directed that his wife should possess the mansion house during her widowhood, and receive the rents and profits of the residue of the premises until she should marry or die, or until one of his sons should attain the age of twenty-one years, which should first happen; and from and after the death or marriage of his said wife, which should first happen, as for and concerning the said mansion house, and as for and concerning the residue of the premises from and after the death or marriage of his said wife, or the time that one of his sons should attain the age of twenty-one, which should first happen, he bequeathed the same to his son Thomas for life, and after his decease then to such issue male or the descendants of such issue male of Thomas as at the time of his death should be his heir at law; and in case at the time of the death of Thomas there should be no such issue male nor any descendants of such issue male then living, then he bequeathed the same in trust to his (the testator's) son George Sawbridge for life, and after his decease then to such issue male or the descendants of such issue male of his said son as at the time of his death should be his heir at law; and in case at the time of the death of the said George Sawbridge there should be no such issue male nor any descendants of such issue male then living, then he bequeathed the said premises, &c. to the child with which his (the testator's) wife was then ensient, in case it should be a son, during his life, and after his decease then to such issue male or the descendants of such issue male of such child as at the time of his death should be his heir at law; and in case at the time of the death of such child there should be no such issue male nor any descendants of such issue male then living, or in case such child should not be a son, then he bequeathed the same to Philippa Long, her executors, &c. The testator died on the 1st of June 1709, leaving his wife Martha and two sons, Thomas and George Sawbridge Blackall, him surviving; the executors named in the will proved the same in the proper Ecclesiastical Court and assented to the above bequest. Martha Blackall, the wife of the testator, at the time of making his will and of his death, was ensient with a son, who was afterwards born and called John Blackall;

these probabilities without requiring security; and upon the case of *Fraser* v. *Fraser* being mentioned, where a similar order was made upon the recognizance of the parties, he thought that would be sufficient.

and Martha Blackall afterwards died on the 16th September 1768. George Sawbridge Blackall died on the 14th of April 1753, without issue. John Blackall died on the 5th March 1754, without issue; and Thomas Blackall died on the 2d March 1786, without issue.

The question directed to be made by the Lord Chancellor for the opinion of the Court of King's Bench was, "Whether the limitation to Philippa Long were good in the events that have happened?"

Chambre for the plaintiff.

East, for two of the defendants, Lord Macclesfield and Musgrave, who had a distinct interest from the others.

Wood was proceeding to argue for the other defendants: but the court expressed themselves so clearly satisfied that the ultimate limitation to the plaintiff was good, that he declined arguing the point; saying that he had no reason, from the view he had taken of the subject, to expect that he should be able to alter their opinion.

Lord Kenyon, C. J. The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age the estate is unalienable. In conformity to that rule the courts have said so far we will allow executory devises to be good. To support this position I could refer to many decisions: but it is sufficient to refer to the *Duke of Norfolk's Case*, 3 Ch. Cas. 1; Pollexf. 223, in which all the learning on this head was gone into; and from that time to the present every judge has acquiesced in that decision. It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation.

Lawrence, J. The devise over in this case must take effect, if at all, after a life which must be in being within nine months after the devisor's death.

The following certificate was afterwards sent to the Lord Chancellor.

This case has been argued before us by counsel. We have considered it, and are of opinion that the limitation to Philippa Long is good in the events that have happened.

Kenyon,	N. Grose.
W. H. Ashhurst,	S. Lawrence.

Feb. 27th, 1797.[1]

[1] In *Goodtitle* d. *Gurnall* v. *Wood*, 23d of June 1740, C. B., Ld. Ch. J. Willes, in delivering the opinion of the court, said, "They (namely, executory devises) have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints to prevent perpetuities; as, first, it was held that the contingency must happen within the compass of a life or lives in being or a reasonable number of years; at

THELLUSSON *v.* WOODFORD.

House of Lords. 1805.

[*Reported* 11 *Ves.* 112.]

Peter Thellusson,[1] by his will, dated April 2, 1796, gave £22,000 bank stock, and £600 per annum, long annuities, subject to a life interest in his wife to his children, gave to each of his sons, Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson, £7600 to make the money already advanced to each of them £23,000, besides small annuities; and gave to each of his three daughters £12,000, besides small annuities. He added: "The provision which I have made for my said three sons, and the very great success they have met with, will be sufficient to procure them comfort; and it is my earnest wish and desire, that they will avoid ostentation, vanity, and pompous show; as that will be the best fortune they can possess."

The testator then gives the residue of his estate, real and personal, to Matthew Woodford, James Stanley and Emperor John Alexander Woodford in trust to invest the same in land in England, and "upon trust that they the said Matthew Woodford James Stanley and Emperor John Alexander Woodford and the survivors and survivor of them and the heirs and assigns of such survivor do and shall from time to time during the natural lives of my sons Peter Isaac Thellusson, George Woodford Thellusson and Charles Thellusson and of my grandson John Thellusson son of my said son Peter Isaac Thellusson and of such other sons as my said son Peter Isaac Thellusson now has or may have and of such issue as my grandson John Thellusson may have, and of such issue as any other sons of my said son Peter Isaac Thellusson may have and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have and of such issue as such sons may have as shall be living at the time of my decease or born in due time afterwards and during the natural lives and life of the survivors and survivor of the several persons aforesaid collect and receive the rents and profits of the manors or lordships messuages lands tenements and hereditaments hereinbefore by me devised and so to be purchased as aforesaid."

The testator then directs that the rents and profits shall be invested in the purchase of other land in England, and that after the decease of

length it was extended a little farther, namely, *to a child in ventre sa mere at the time of the father's death, because as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience;* and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetnity." MS. — Rep.

[1] The following statement is substituted for that in the reports.

the survivor of the said several persons, during whose lives the rents and profits of the estates devised and to be purchased are directed to accumulate, an equal partition shall be made of the said estates, the whole to be divided into three lots of equal value, or as near thereto as possible.

The will then proceeds to direct the limitations in the following manner: —

"And that the premises contained in one of such allotments shall be conveyed to the use of the eldest male lineal descendant then living (and who shall be entitled to the first choice of such allotments) of my said son Peter Isaac Thellusson in tail male with remainder to the second third fourth and all and every other male lineal descendant or descendants then living who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited of my said son Peter Isaac Thellusson successively in tail male with remainder in equal moieties to the eldest and every other male lineal descendant or descendants then living of my said sons George Woodford Thellusson and Charles Thellusson as tenants in common in tail male in the same manner as hereinbefore directed with respect to the eldest and every other male lineal descendant or descendants of my said son Peter Isaac Thellusson with cross remainders between or among such male lineal descendants as aforesaid of my said sons George Woodford Thellusson and Charles Thellusson in tail male or in case there shall be but one such male lineal descendant then to such one in tail male with remainder to the use of them the said Matthew Woodford James Stanley and Emperor John Alexander Woodford their heirs and assigns forever upon the trusts and to and for the intents and purposes hereinafter mentioned expressed and declared of and concerning the same."

The premises included in one other of such allotments are in the same manner directed to be conveyed to the use of the eldest male lineal descendant then living (to have the second choice of such allotments) of the testator's son George Woodford Thellusson; with similar limitations to his second, third, fourth and every other male lineal descendant, &c. and to the male lineal descendants of Peter Isaac Thellusson and Charles Thellusson in moieties, with cross-remainders among them, and the ultimate remainder in the same manner to the use of the trustees in fee upon the trusts after mentioned.

The conveyance of the premises included in the remaining lot is directed in the same manner to the use of the eldest and other male lineal descendants of the testator's son Charles Thellusson then living; with similar limitations in remainder to the male lineal descendants of his two brothers, and to the trustees in fee.

The testator then directs that in case of the failure of male lineal descendants of his said sons, the trust estates shall be sold and the proceeds paid to the King and his successors, to be applied to the use of the sinking fund in such manner as shall be directed by Act of Parliament.

The will further directs that any persons who shall become entitled to any part of the estates shall use the surname of Thellusson only, and in default thereof the estates shall go to the King as aforesaid.

The will then proceeds thus: —

"As I have earned the fortune which I now possess with industry and honesty, I trust and hope that the legislature will not in any manner alter my will or the limitations thereby created, but permit my property to go in the manner in which I hereby dispose of it."

The testator died on the 21st of July, 1797. At the time of his death, the state of the family was as follows: —

He left surviving him his wife, and three sons: Peter Isaac Thellusson, his eldest son and heir at law, of the age of thirty-six years, George Woodford Thellusson, of the age of thirty-three years, and Charles Thellusson, of the age of twenty-eight years, all married; three daughters: Maria, married to the Honorable Augustus Phipps; Ann Thellusson, and Augusta Charlotte Thellusson.

His grandchildren were, John Thellusson, of the age of eleven years; George Thellusson, of the age of six years; Henry Thellusson, of the age of five years; Frances Thellusson, of the age of seven years; and Carolina Thellusson, of the age of four years: all the children of Peter Isaac Thellusson: Mary Ann Thellusson, of the age of seven years, and Georgiana Thellusson, of the age of two years, the only children of George Woodford Thellusson; and Charles Thellusson, of the age of five months, the only son of the testator's son Charles Thellusson.

At the time of the testator's death the lady of his son Peter Isaac Thellusson was pregnant; and soon afterwards she had twin sons born, namely, William Thellusson and Frederick Thellusson.

Upon this case two suits were instituted: —

The first arose upon a bill filed by the widow and children of the testator against the acting trustees and executors, the two sons of Peter Isaac Thellusson born since the death of the testator, and the Attorney-General, to have the trusts of the will declared void, and the real estate conveyed to the plaintiff Peter Isaac Thellusson, as heir at law, and the personal estate divided among the plaintiffs, according to the Statute of Distributions.

The other cause was instituted by the trustees, to have the directions of the court for establishing the trusts of the will.

The bill prayed the necessary directions for that purpose, and that it might be declared whether Peter Isaac Thellusson, as heir at law of the testator, was or was not entitled to such parts or particulars of his real estate, as were conveyed to him after making his will, and also to such particulars of his real estates as were purchased, contracted or agreed to be purchased, by the testator after making his will, and to have such of the said contracts, as remained unperformed at his decease, completed for the benefit of his said heir at law, and to have the purchase-money paid out of the personal estate of the testator; and particularly, that it might be declared, whether the heir was entitled both to such

last-mentioned real estates, and also to the legacies and bequests in the will; and if not, then that he might be put to his election.

The testator within a month before his death contracted for the purchase of real estates to the extent of £30,000.

The property, upon which the trusts were to attach, consisted of real estates in England, of the annual value of above £4500, some real estates in the West Indies, and personal property estimated at above £600,000. Various calculations were made as to the probable result of the accumulation. According to the lowest computation, supposing the survivor of the persons, during whose lives the accumulation was to continue, should live seventy years, the property at the end of that period, if improved at compound interest, at the rate of five per cent, would amount to above nineteen millions sterling. Other calculations upon different data carried it much higher.

The causes were first opened in Michaelmas Term before the Lord Chancellor [Lord Loughborough;] when his lordship said, the case was of great importance and a good deal of novelty; and he could not do better for the accommodation of the parties, than by asking the opinion of the two judges; which would be better than framing any case for a court of law; and, indeed, being the direction of the trust, it seemed more proper for this court.

Mr. Mansfield, *Mr. Grant*, *Mr. Hargrave*, *Mr. Cox*, *Mr. Hubbersty*, and *Mr. Greenhill*, for the widow and children of the testator.

Mr. Piggott and *Mr. King*, for the acting trustees; *Mr. Sutton*, for William Thellusson and Frederick Thellusson, the two grandsons of the testator born after his death; the *Attorney-General*, *Solicitor-General*, and *Mr. Campbell*, for the Crown.

The case was heard in December, 1798, before Lord Loughborough, C., assisted by Sir Richard Pepper Arden, and Buller and Lawrence, JJ. They all concurred in the opinion that the will was valid. Their judgments, which were delivered in April, 1799, and are reported 4 Ves. 227, 309–313, are here omitted.

These causes came on by appeal from the decree, made in consequence of the judgment given by *Lord Loughborough*, Chancellor, *Lord Alvanley*, then Master of the Rolls, and the Judges *Buller* and *Lawrence*. The decree dismissed the bill in the original cause, so far as it prayed, that the limitations and dispositions, contained in the will of Peter Thellusson concerning his real estates, and the general residue of his personal estate, and the rents, issues, and profits, of such estates, and concerning the estates directed to be purchased, and the rents and profits thereof, and the trusts thereof, might be declared void: and in the cross cause declared, that the will ought to be established and the trusts of it performed and carried into execution; and declared the devises and limitations of the estates contained in the will to be good and valid in law; and decreed and gave directions accordingly. Peter Isaac Thellusson, after the decree, had three sons born, viz. Edmund Thellusson, Alexander Thellusson, and Arthur Thellusson;

and Charles Thellusson (the elder) also had one son born, viz. Thomas Thellusson; and Ann, one of the testator's three daughters, married William Lukin. All these persons were made parties.

The appellants, the widow and children of the testator, appealed from the decree.

This case was argued on several days at the bar of the House by *Mr. Mansfield* and *Mr. Romilly*, for the appellants, and by the *Attorney-General* [*Hon. Spencer Perceval*], the *Solicitor-General* [*Sir T. M. Sutton*], *Mr. Piggott*, *Mr. Richards*, *Mr. Alexander*, and *Mr. Cox*, for the respondents. After the argument the following questions were proposed to the judges on the motion of the Lord Chancellor [Eldon]: —

1st, A testator by his will, being seised in fee of the real estate, therein mentioned, made the following devise: "I give and devise all my manors, messuages, tenements, and hereditaments, at Brodsworth in the county of York after the death of my sons Peter Isaac Thellusson George Woodford Thellusson and Charles Thellusson and of my grandson John Thellusson son of my son Peter Isaac Thellusson and of such other sons as my said son Peter Isaac Thellusson may have and of such sons as my said sons George Woodford Thellusson and Charles Thellusson may have and of such issue as such sons may have as shall be living at the time of my decease or born in due time afterwards and after the deaths of the survivors and survivor of the several persons aforesaid to such person as at the time of the death of the survivor of the said several persons shall then be the eldest male lineal descendant of my son Peter Isaac Thellusson and his heirs forever." — At the time of the testator's death there were seven persons actually born, answering the description mentioned in the testator's will; and there were two *en ventre sa mere* answering the description; if children *en ventre sa mere* do answer that description. All the said several persons, so described in the testator's will, being dead, and, at the death of the survivor of such several persons there being living one male lineal descendant of the testator's son Peter Isaac Thellusson, and one only. Is such person entitled by law, under the legal effect of the devise above stated, and the legal construction of the several words, in which the same is expressed, to the said manors, messuages, tenements, and hereditaments, at Brodsworth?

2d, If at the death of the survivor of such several persons as aforesaid, such only male lineal descendant was not actually born, but was *en ventre sa mere*, would such lineal descendant, when actually born, be so entitled?

June 25th. The unanimous opinion of the judges was pronounced by the Lord Chief Baron Macdonald. The other judges present were Lord Ellenborough, Grose, Le Blanc, Heath, Rooke, Chambre: Barons Thomson and Graham. Since the argument Lord Alvanley had died; and Baron Hotham resigned: the former being succeeded by Sir James Mansfield; the latter by Sir T. M. Sutton.

Sir A. Macdonald, Chief Baron. The first objection to the will is, that the testator has exceeded that portion of time, within which the contingency must happen, upon which an executory devise is permitted to be limited by the rules of law; for three reasons: First, because so great a number of lives cannot be taken as in the present instance, to protract the time, during which the vesting is suspended, and consequently the power of alienation is suspended: Secondly, that the testator has added to the lives of persons, who should be born at the time of his death, the lives of persons who might not be born: Thirdly, that after enumerating different classes of lives, during the continuance of which the vesting is suspended, the testator has concluded with these restrictive words, "as shall be living at the time of my decease or born in due time afterwards;" and that, as these words appertain only to the last class in the enumeration, the words, which are used in the preceding classes being unrestricted, they will extend to grandchildren and great-grandchildren, and their issue; and so make this executory devise void in its creation, as being too remote. With respect to the first ground, namely, the number of lives taken, which in the present instance is nine, I apprehend, that no case or *dictum* has drawn any line as to this point, which a testator is forbidden to pass. On the contrary, in the cases, in which this subject has been considered by the ablest judges, they have for a great length of time expressed themselves as to the number of lives, not merely without any qualification or circumscription, but have treated the number of co-existing lives as matter of no moment; the ground of that opinion being, that no public inconvenience can arise from a suspension of the vesting, and thereby placing land out of circulation during any one life; and that in fact the life of the survivor of many persons named or described is but the life of some one. This was held without dissent by Twisden in *Love* v. *Wyndham*, 1 Mod. 50, twenty years before the determination of the *Duke of Norfolk's Case;* who says, that the devise of a farm may be for twenty lives, one after another, if all be in existence at once. By this expression he must be understood to mean any number of lives, the extinction of which could be proved without difficulty. When this subject of executory trusts came to be examined by the great powers of Lord Nottingham as to the time, within which the contingency must happen, he thus expresses himself: "If a term be devised, or the trust of a term limited, to one for life with twenty remainders for life successively, and all the persons are in existence and alive at the time of the limitation of their estates, these, though they look like a possibility upon a possibility, are all good, because they produce no inconvenience; they wear out in a little time." With an easy interpretation we find from Lord Nottingham, what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience; namely, where an executory devise would have the effect of making lands unalienable beyond the time, which is allowed in legal limitations; that is, beyond the time, at which one in remainder would attain his age of twenty-one; if he were

not born, when the limitations were executed. When he declares, that he will stop, where he finds an inconvenience, he cannot, consistently with sound construction of the context, be understood to mean, where judges arbitrarily imagine, they perceive an inconvenience; for he has himself stated, where inconvenience begins; namely, by an attempt to suspend the vesting longer than can be done by legal limitation. I understand him to mean, that, wherever courts perceive, that such would be the effect, whatever may be the mode attempted, that effect must be prevented; and he gives the same, but no greater, latitude to executory devises and executory trusts as to estates tail. This has been ever since adopted. In *Scatterwood* v. *Edge*, 1 Salk. 229, the court held, that an executory estate, to arise within the compass of a reasonable time, is good; as twenty or thirty years: so is the compass of a life or lives: for let the lives be never so many, there must be a survivor; and so it is but the length of that life. In *Humberston* v. *Humberston*, 1 P. Wms. 332, where an attempt was made to create a vast number of estates for life in succession, as well to persons unborn as to persons in existence, Lord Cowper restrained that devise within the limits assigned to common law conveyances, by giving estates for life to all those, who were living (at the death of the testator), and estates tail to those, who were unborn; considering all the co-existing lives (a vast many in number) as amounting in the end to no more than one life. His lordship was in the situation alluded to by Lord Nottingham, where a visible inconvenience appeared. The bounds prescribed to limitations in common law conveyances were exceeded: the excess was cut off; and the devise confined within those limits. Lord Hardwicke repeats the same doctrine in *Sheffield* v. *Lord Orrery*, 3 Atk. 282; using the words "life or lives" without any restriction as to number. Many other cases might be cited to the like effect: but I shall only add what is laid down in two very modern cases. In *Gurnall* v. *Wood*, Willes, 211, Lord Chief Justice Willes speaks of a life or lives without any qualification; and Lord Thurlow, in *Robinson* v. *Hardcastle*, 2 Bro. C. C. 30, says, that a man may appoint 100 or 1000 trustees, and that the survivor of them shall appoint a life estate. It appears then, that the co-existing lives, at the expiration of which the contingency must happen, are not confined to any definite number. But it is asked, shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered, that, when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described; and will be supported or avoided accordingly. But it is contended, that in these and other cases the persons, during whose lives the suspension was to continue, were persons immediately connected with or immediately leading to the person, in whom the property was first to vest, when the suspension should be at an end.

I am unable to find any authority for considering this as a *sine qua non* in the creation of a good executory trust. It is true that this will almost always be the case and mode of disposing of property, introduced and encouraged up to a certain extent, for the convenience of families; in almost all instances looking at the existing members of the family of the testator and its connections. But when the true reason for circumscribing the period, during which alienation may be suspended, is adverted to, there seems to be no ground or principle, that renders such an ingredient necessary. The principle is the avoiding of a public evil by placing property for too great a length of time out of commerce. The length of time will not be greater or less, whether the lives taken have any interest, vested or contingent, or have not; nor, whether the lives are those of persons immediately connected with, or immediately leading to that person in whom the property is first to vest: terms, to which it is difficult to annex any precise meaning. The policy of the law, which, I apprehend, looks merely to duration of time, can in no way be affected by those circumstances. This could not be the opinion of Lord Thurlow in *Robinson* v. *Hardcastle:* nor is any such opinion to be found in any case or book upon this subject. The result of all the cases upon this point is thus summed up by Lord Chief Justice Willes, (Willes, 215,) with his usual accuracy and perspicuity:

"Executory devises have not been considered as mere possibilities, but as certain interests and estates; and have been resembled to contingent remainders in all other respects: only they have been put under some restraints, to prevent perpetuities. As at first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little farther, namely, to a child *en ventre sa mere* at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has in many instances been extended to twenty-one years after the death of a person in being; as in that case likewise there is no danger of a perpetuity."

Comparing what the testator has done in the present case with what is above cited, it will appear, that he has not postponed the vesting even so long as he might have done.

The second objection, which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. It becomes, therefore, necessary to discover, in what sense the testator meant to use the words "born in due time afterwards." Such words, in the case of a man's own children, mean the time of gestation. What is to be intended by these words in his will, must be collected from the will itself. It may be collected from the will itself, that by those words the testator meant to describe the period of time within which issue might be born, during whose lives the trust might legally continue; or in other words, whom the law would consider as born at the time of his decease. These could

only be such children of the several persons named as their respective mothers were *enceinte* with at the time of his death. He may have meant to use the word "due" as denoting that period of time, which would be the necessary period for effecting his purpose. This is probable from his using the same word, as applied to the time, during which the presentation to the living of Marr might be suspended without incurring a lapse. That a child *en ventre sa mere* was considered as in existence, so as to be capable of taking by executory devise, was maintained by Powell in the case of *Loddington* v. *Kime*, 1 Lord Raym. 207, upon this ground; that the space of time between the death of the father and the birth of the posthumous son was so short, that no inconvenience could ensue. So in *Northey* v. *Strange*, 1 P. Wms. 340, Sir J. Trevor held, that by a devise to children and grandchildren an unborn grandchild should take. Two years after, Lord Macclesfield in *Burdet* v. *Hopegood*, 1 P. Wms. 486, held, that, where a devise was to a cousin if the testator should leave no son at the time of his death, a posthumous son should take, as being left at the testator's death. In *Wallace* v. *Hodgson*, 2 Atk. 117, Lord Hardwicke held, that a posthumous child was entitled under the Statute of Distributions; and his reason deserves notice. "The principal reason (says he) that I go upon, is, that the plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*: so that by the rules of the common and civil law she was, to all intents and purposes, a child, as much as if born in the father's lifetime." Such a child, in charging for the portions of other children living at the death of the father, is included as then living: *Beale* v. *Beale*, 1 P. Wms. 244, and so in a variety of other cases. In *Basset* v. *Basset*, 3 Atk. 203, Lord Hardwicke decreed rents and profits, which had accrued at a rent-day preceding his birth, to a posthumous child; and since the Stat. 10 and 11 W. III. *c.* 16, such children seem to be considered in all cases of devise, and marriage or other settlement, to be living at the death of their father, although not born till after his decease. It is otherwise considered in the case of descent. In *Roe* v. *Quartley*, 1 Term Rep. 634, the devise was to Hester Read for life, daughter of Walter Read, and to the heirs of her body; and for default of such issue, to such child as the wife of Walter Read is now *enceinte* with, and the heirs of the body of such child, then to the right heirs of Walter Read and Mary his wife. It was contended, that the last limitation was too remote; as coming after a devise to one not in being, and his issue. But the court said, that since the Statute of King William, which puts posthumous children on the same footing with children born in the lifetime of their ancestor, this objection seemed to be removed, whatever was the case before. In *Gulliver* v. *Wickett*, 1 Wils. 105, the devise was to the wife for life, then to the child, with which she was supposed to be *enceinte*, in fee, provided, that, if such child should die before twenty-one leaving no issue, the reversion should go to other persons named. The court said, if there had been no devise to the wife

for life, which made the ulterior estate a contingent remainder, the devise to the child *en ventre sa mere,* being *in futuro*, would have been a good executory devise. In *Doe* v. *Lancashire*, 5 Term Rep. 49, the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a will, in like manner as if the child had been born in the lifetime of the father. In *Doe* v. *Clarke*, 2 H. Black. 399, Lord Chief Justice Eyre holds, that independent of intention an infant *en ventre sa mere* by the course and order of nature is then living; and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happened to be actually born at the time of his death. The most recent case is that of *Long* v. *Blackall*, 3 Ves. Jr. 486; 7 Term Rep. 100. There the Court of King's Bench had no doubt, that a devise to a child *en ventre sa mere* in the first instance was good, and a limitation over was good also, on the contingency of there being no issue male or descendant of issue male living at the death of such posthumous child. It seems then, that if estates for life had been given to the several *cestuis que vie* in this will, and after their deaths to their children, either born or *en ventre sa mere* at the testator's death, they would have been good. No tendency to perpetuity then can arise in the case of such lives being taken, not to confer on them a measure of the beneficial interest, but to fix the time, during which the vesting of the property, which is the subject of this devise, shall be protracted; inasmuch as the circulation of real property is no more fettered in one case than in the other. It is, however, observable, that this question may never arise, if it shall so happen, that the children *in ventre matris* at the death of the testator shall not survive those, who were then born.

The third ground of objection depends upon the application of the restrictive words, which are added to the enumeration of the different classes of persons, during whose lives the restriction is suspended. This objection, I conceive, will be removed by the application of the usual rules in construing wills to the present case. First, where the intention of the testator is clear, and is consistent with the rules of law, that shall prevail. His intention evidently was to prevent alienation as long as by law he could. If then it is to be supposed, that the restrictive words are to be confined to the last of seven different descriptions of persons, and that the testator intended to leave the four descriptions of persons which immediately preceded this 7th class, without the benefit of such restriction, although they equally stand in need of it, we must do the utmost violence to all established rules on this head. That construction is to be adopted, which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply, when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt

at the idea of overlooking the plain intent, which is disclosed in the context; namely, that they should be applicable to such classes as require them, and as to the others to consider them as surplusage. If words admit of more constructions than one, that, which will support the legal intention of the testator, is in all cases to be adopted. I do not trouble your Lordships with any observation upon the objections arising from the magnitude of the property in question; either as it now stands, or may hereafter stand; or as to the motives, which may have influenced this testator, or his neglect of those considerations, by which I or any other individual may or ought to have been moved. That would be to suppose, that such topics can in any way affect the judicial mind. For these imperfect reasons I concur with the rest of the judges in offering this answer to your Lordships' first question.

With respect to your lordships' second question, the objection to such child being entitled must arise from an allowance having been made for the time of gestation at the end of the executory trusts. It seems to be settled, that an estate may be limited in the first instance to a child unborn, and, I apprehend, to the first and other sons in fee, as purchasers. The case of *Long* v. *Blackall*, 3 Ves. Jr. 486; 7 Term Rep. 100, seems to have decided, that an infant *in ventre matris* is a life in being. The established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child. If then this time has been allowed in some cases at the beginning, and in others at the termination, of the suspension, and if such children are considered by the construction of the Statute of 10 & 11 W. III. *c.* 16, as being born to such purposes, what should prevent the period of gestation being allowed both at the commencement and termination of the suspension, if it should be called for? In those cases, where it has been allowed at the commencement, and particularly in *Long* v. *Blackall*, it must have been obvious to the court, that it might be wanting at the termination: yet that was never made an objection. In *Gulliver* v. *Wickett*, 1 Wils. 105, the child, who was supposed to be *en ventre sa mere*, might have married and died before twenty-one, and have left his wife *enceinte*. In that case a double allowance would have been required: yet that possibility was never made an objection; although it was obvious. In *Long* v. *Blackall*, according to the printed report, the precise point was not gone into. But it is plain, that the intention of the court must have been drawn to it; for the learned judge,[1] who argued that case in support of the devise, expressly stated, that every common case of a limitation over, after a devise for a life in being, with remainder in trust to his unborn issue, includes the same contingency as was then in question; for the devisee for life may die leaving his wife *enceinte:* and the only difference is, that the period of gestation occurs at the beginning instead of the end of the first legal estate. It must have been palpable, that it might possibly occur at both ends. Every reason then for allowing the

[1] Mr. Justice Chambre, then at the bar.

period of gestation in the one case, seems to apply with equal force to the other; and leads the mind to this conclusion, that it ought to be allowed in both cases, or in neither case. But natural justice, in several cases, having considered children *en ventre sa mere* as living at the death of the father, it should seem, that no distinction can properly be made; but that in the singular event of both periods being required they should be allowed; as there can be no tendency to a perpetuity.

The Lord Chancellor. [Lord Eldon.] The learned judges having given their opinion upon the points of law, referred to them, no question remains, to which the attention of the House should be particularly called, except the point, arising out of this will, and which could not be referred to the judges; with regard to the accumulation of the rents and profits. When this cause was decided in the Court of Chancery, it was decided by Lord Rosslyn, with the assistance of Lord Alvanley, Mr. Justice Buller, and Mr. Justice Lawrence; and it is well known, that the late Chief Justice [Lord Kenyon] of the Court of King's Bench could hardly be brought to think any of the questions in this case fit for argument; conceiving it dangerous to give so much of serious agitation to them, as has been had; considering what had been settled with respect to executory devise and accumulation. Some of your Lordships have had the advantage of hearing the opinion of Lord Thurlow; which cannot be doubted upon this point; after his Lordship has laid down, in *Robinson* v. *Hardcastle*, 2 Bro. C. C. 22 (see page 30), what is unquestionable law, that it is competent to a testator to give a life-estate, to be appointed by the survivor of 1000 persons. That estate would be to commence at the death of the last of those 1000 persons. Upon the questions of law your Lordships have had the unanimous opinion of the several learned judges. As far as judicial opinion can be collected, there is, therefore, the testimony of all the judicial opinion I have detailed, concurrent upon this great case: great, with reference, not to the questions arising out of it, but to that circumstance, of which, whatever attention your Lordships may think proper to give it in your legislative capacity, you cannot, exercising the function of judges, take notice; for the question of law is the same upon a property of £100 or a million. If it were possible, speaking judicially, to say, you entertain a wish upon the subject, your Lordships may all concur in the regret, that such a will should be maintained. But that goes no farther than as a motive to see, whether it contains anything, resting upon which we may as judges say it is an attempt to make an illegal disposition.

When this was put originally as a case, representing, that it was monstrous to tie up property for nine lives, it seemed to me a proposition, that is incapable of argument as lawyers; for the length of time must depend, not upon the number, but upon the nature of the lives. If we are to argue upon probability, two lives may be selected, affording much more probability of accumulation and postponement of the time of vesting, than nine or ninety-nine lives. Look at the obituary

of this House since the year 1796; when this will was made. Suppose, the testator had taken the lives of so many of the peers as have died since that time: that would have been between twenty and thirty lives; and yet that number has expired in a very short period. It cannot therefore depend upon the magnitude of the property, or the number of lives: but the question always is, whether there is a rule of law, fixing a period, during which property may be unalienable. The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that, to which testimony can be applied, to determine, when the survivor of them drops.

If the law is so as to postponing alienation, another question arises out of this will; which is a pure question of equity: whether a testator can direct the rents and profits to be accumulated for that period, during which he may direct, that the title shall not vest, and the property shall remain unalienable; and, that he can do so, is most clear law. A familiar case may be put. If this testator had given the residue of his personal estate to such person as should be the eldest male descendant of Peter Isaac Thellusson at the death of the survivor of all the lives, mentioned in this will, without more, that simple bequest would in effect have directed accumulation, until it should be seen, what individual would answer the description of that male descendant; and the effect of the ordinary rule of law, as applied in equity, would have supplied everything, that is contained in this will, as to accumulation; for the first question would be, is the executory devise of the personal estate to the future individual, so described, good? If it is, wherever a residue of personal estate is given, the interest goes with the bulk; and there is no more objection to giving that person, that, which is only forming another capital, than to giving the capital itself. But the constant course of a court of equity is to accumulate interest from time to time without a direction, and to hand over the accumulation to that person, who is to take the capital. Take another instance of accumulation: suppose, the nine persons, named in this will, had been lunatics: without any direction there would have been an accumulation of the interest and profits of all these estates. In truth there is no objection to accumulation upon the policy of the law, applying to perpetuities; for the rents and profits are not to be locked up, and made no use of, for the individuals, or the public. The effect is only to invest them from time to time in land: so that the fund is, not only in a constant course of accumulation, but also in a constant course of circulation. To that application what possible objection can there be in law?

But this is not new; for in the case upon Lady Denison's will[1] Lord Kenyon, who saw great danger in permitting argument to go too far against settled rules, held most clearly, that the testatrix had well given her property to such second son of her infant niece as should

[1] *Harrison* v. *Harrison*, 21st July, 1786: stated from the Register's Book, 4 Ves. 333. — REP.

first attain the age of twenty-one; and directed accumulation through the whole of that period; following Lord Hardwicke and his predecessors; and taking the rule to be perfectly clear, that, so long as the property may be rendered unalienable, so long there may be accumulation; that in common sense it is only giving the accumulation to the person, who is to take the fund itself; if it could be foreseen, who that person would be. Therefore, as to giving the property at the expiration of nine lives and the accumulation, I never could doubt upon these points. The latter could not be a subject of dispute before the late Act of Parliament (Stat. 39 & 40 Geo. III. c. 98); which has been sometimes, though without foundation, attributed to me; and which in some respects I would have corrected, if it had not come upon me rather by surprise. That Act however expressly alters what it takes to have been the former law upon the subject; admitting the right to direct accumulation; and reducing that right in given cases to the period of twenty-one years. The amount of accumulation, even through the provisions of that Act, though only to endure for twenty-one years, might in many instances, by giving the son a scanty allowance, be enormous. I do not think, it was intended: but the accumulation directed by this will must under that Act have gone on for twenty-one years. In the construction of that Act it has been held, that it only makes void so much of the disposition as exceeds twenty-one years; leaving it good for that period. Upon the old rule also accumulation for particular purposes might have gone on for nine lives, or more.

The only points, that appear to me fairly to bear argument, are the critical discussion upon the word "as," as a relative term, and that with reference to the double period of gestation. As to the former, if your Lordships could from dislike to such a will refuse that construction, which will consider that word as a word of reference to each preceding description of persons, grounding that construction upon the manifest intention of the testator upon the whole will to make the property unalienable, as long as he could, you would gratify that inclination at the expense of overturning all the rules of construction, that have been settled, and applied for ages to support wills. If your Lordships will give any relief by legislative interference against this will, that is a very bold proposition; but not so bold as, that, because you dislike the effect of the will, you will give a judgment wrong in point of law.

As to the other point, upon the words "born in due time afterwards," I observe in the report, the Judges Lawrence and Buller afford each a construction of these words: the one, that they mean children *en ventre sa mere:* the other held them a declaration of the testator's will, that the property shall be unalienable, and the accumulation go on, during the lives of all the persons, born or unborn, whom the law would authorize him to take as the lives for restraint of alienation, and for the purpose of accumulation. In my opinion either of those constructions may be taken to be the intention consistently with the rules of law: but consistently with the rules of law your Lordships

cannot reject both; but must give the words such a construction as will support the manifest intention of the testator. It is therefore beside the point to ask, what child shall take, or, when a child shall take; for the testator is describing, not the object to take, but the lives of persons; in order to define the period, during which the power of alienation shall not exist, and the accumulation shall go on. But, if it is necessary, I have no difficulty in stating, as a lawyer, that the rule of law has been properly laid down, that the time of gestation may be taken both at the beginning and the end; and that is what was meant in *Gulliver* v. *Wickett*, 1 Wils. 105, in which case the devise was to a child *en ventre sa mere;* and to go over, if that child should die under the age of twenty-one, leaving no issue. In the construction of that limitation, expressly to a child *en ventre sa mere*, suppose that child had at the age of twenty married, and died six months afterwards leaving his wife *enciente:* that property, absolutely given to him, would not be devested, merely because the child was not born till three months after his death. In fair reasoning therefore that is the construction of the words.

Of the case of *Long* v. *Blackall*, 3 Ves. 486; 7 Term Rep. 100, in which I was counsel, I can give a faithful history. It was my duty to submit to the Lord Chancellor the point, that the allowance was claimed at both ends of the period. His Lordship treated the point not with much respect: but I prevailed with him against his inclination to send it to the Court of King's Bench. Upon the report of the case in that court the point did not appear to have been discussed. I therefore pressed the Lord Chancellor to send the case back. His answer was as rough, as his nature, which was very gentle, would permit; and shows the clear opinion he had upon the point. He said distinctly, he was ashamed of having once sent it to a court of law; and would not send it there again. I know, Lord Kenyon's opinion upon the subject was clear: so were those of Mr. Justice Buller and Mr. Justice Lawrence; as may be collected from the report of these causes. (4 Ves. 314, 315, 321.) This case therefore comes to this, and this only. The legal and equitable doctrine is clear; and then the question is, with whatever regret we may come to the determination, is it not our duty to determine according to the rules of law and equity? Upon the question, whether this judgment ought to be reversed, I am bound to say, it ought not; but that it ought to be affirmed.

Upon the motion of the Lord Chancellor the decree was affirmed.

ASHLEY *v.* ASHLEY.

CHANCERY. 1833.

[*Reported* 6 *Sim.* 358.]

[This case will be found p. 226 *ante.*]

BEARD *v.* WESTCOTT.

COMMON PLEAS, KING'S BENCH, AND CHANCERY. 1810–1822.

[*Reported* 5 *Taunt.* 393 ; 5 *B. & Ald.* 801 ; *T. & R.* 25.]

THIS case was sent by *Sir William Grant*, M. R., for the opinion of the Court of Common Pleas.

John James[1] was, in his lifetime, and at the times of making his will, and of his death, seised in fee simple of divers freehold estates, and also possessed of divers leasehold estates for long terms of years, and made his will, duly executed and attested, for passing real estates, whereby he devised a particular estate, consisting of freehold and leasehold lands, unto his grandson, John James Beard and his assigns, so that he and they might receive and take the rents, issues, and profits thereof, to his and their use, during the term of ninety-nine years, if he should so long live, subject to the provisos, conditions, and considerations thereinafter mentioned: and immediately after his decease then to the first son of his body, lawfully to be begotten, and his assigns, to receive and take the yearly rents thereof, to his and their own use, for the like term of ninety-nine years, if he should happen so long to live, and so on in tail male to such first son lawfully issuing forever. And for want and in default of such issue of such first son, then to the use and behoof of the second and all and every other son and sons of John James Beard, severally, successively, and in remainder, one after another, as they should be in seniority of age and priority of birth, and the issue male of such son or sons, lawfully issuing, for the like term of ninety-nine years only (in case he should so long live); and that such elder son, or the issue of such elder son, should have no greater estate than for the term of ninety-nine years, determinable at his decease, and the elder son of such issue male always to take place before the younger of such son and sons, and the issue male of his and their bodies lawfully issuing, subject to the provisos and conditions therein mentioned: "And in case there should be no issue male of the said John James Beard, nor issue of such issue male at the time of his death, or in case there should be such issue male at that time, and they should all die before they should respectively attain twenty-one, without lawful issue male," then there were similar limitations over to Joseph Beard (the brother of John James Beard) and his sons, and issue male, with a similar gift over, in case there should be no issue male of Joseph Beard, &c., to his granddaughters, Elizabeth Beard and Mary Beard, sisters of John James Beard and Joseph Beard, and their assigns, to receive and take the rents, issues, and profits thereof, to their sole use and benefit (whether sole or covert) as tenants in common, and not as joint-tenants, during the term

[1] This statement of the case is taken from 5 B. & Ald. 801–804.

of ninety-nine years, if they should so long live, and after their respective deaths, then to the first and other son and sons of their respective bodies, to receive the rents of the said premises, according to the respective interests of their mother, father, or grandmother, for the term of ninety-nine years only, in case they should so long live, and so on *toties quoties* forever; and in case there should only be one son of the bodies of Elizabeth and Mary Beard, then to such only son and his assigns, during the said term of ninety-nine years, if he should so long live, and immediately after his decease, then to the first son of that son and his son, for the like term of ninety-nine years only, if he should so long live; and that no issue male of his said granddaughters, or their respective issue, should take any greater estate or interest therein, than for ninety-nine years at any one time, and so on forever. There were similar limitations over, in like manner, to daughters of his four grandchildren. Then he gave another estate in like manner, giving the preference to Joseph Beard, and his issue. Then he gave another estate to Elizabeth, and her assigns, for ninety-nine years, in case she should so long live; and after her decease, he gave the same to all and every the children of Elizabeth that should be living at the time of her death, and their respective assigns, as tenants in common, for the like term of ninety-nine years, if they should so long live; and in case of but one such child, then to such only child, his or her assigns, for the like term of ninety-nine years, if he or she should so long live, and so on to their issue; and there was a like devise of another estate to the other granddaughter.

John James, soon after the date and execution of his will, died so seised and possessed of such of his said freehold and leasehold estates without having revoked his will. John James Beard, the plaintiff, is the grandson and heir-at-law of the testator. Joseph Beard, brother of the plaintiff, and another of the devisees survived the testator, but died in February, 1804, at the age of nineteen years, leaving one only son, who is since dead, an infant. Elizabeth Beard, another of the devisees, survived the testator, and afterwards intermarried with the defendant, John Caruthers, and died after attaining twenty-one, leaving the defendant, John Caruthers the younger, an infant, her only child. Mary Beard, another of the devisees, intermarried with the defendant, Thomas Combes, and is still alive, having two daughters, namely, the defendants, Mary Ann Combes and Elizabeth Combes. At the time of the testator's death John James Beard had attained twenty-one; but Joseph Beard, Elizabeth Beard, and Mary Beard, the other grandchildren, were all infants. All of them, including John James Beard, were at that time unmarried.

The first question for the opinion of the court, was, what estate and interest did the plaintiff, John James Beard, the grandson and heir-at-law of John James the testator, take in the freehold estates, and what estate and interest did he take in the leasehold estates under the testator's will? The second question was, whether all, or any, and which,

of the several limitations in the testator's will, subsequent and expectant upon the several and respective limitations to the testator's grandson Joseph Beard, his granddaughter Elizabeth Beard, (afterwards Elizabeth Caruthers,) and his granddaughter Mary Beard, (now Mary Combes,) for ninety-nine years, if they the said Joseph Beard, Elizabeth Beard, and Mary Beard, should respectively so long live, were void and contrary to law, or were any, and which of such limitations good and effectual?

The case was first argued in Michaelmas Term, 1809, by *Manley*, Serjt., for the plaintiff, and *Vaughan*, Serjt., for the defendants.

The court considered at once that it would come within the case of *Somerville* v. *Lethbridge* [6 T. R. 213].

But in the following Hilary Term the court desired the case might be again spoken to; and accordingly, in Easter Term, 1810, it was argued by *Lens*, Serjt., for the plaintiff, and *Vaughan*, Serjt., for the defendants.

The judges afterwards sent to the *Master of the Rolls* the following certificate: —

Having heard the arguments of counsel in this case, we are of opinion that John James Beard, the grandson and heir-at-law of John James the testator, took under the said testator's will, an estate for ninety-nine years, determinable with his life, in the freehold estates devised to him in the first instance, and also in the leasehold estates devised, if they should so long continue; and that upon his death, leaving one or more sons, his first son will take a like estate therein for a term of ninety-nine years, determinable with his life, in the freehold estates, and also in what shall then remain of the respective terms for which the leasehold estates are held. We are also of opinion, that in the event of there being no son or sons of the said John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years, without lawful issue male, the testator's grandson, Joseph Beard, will take a like estate in the said freehold and leasehold property, determinable as aforesaid; and that upon his death, leaving one or more sons, his first son, in the events above mentioned, will take a like estate therein for ninety-nine years, determinable as aforesaid; and that in the event of there being no son or sons of the said Joseph Beard, nor issue male of such son or sons living at the death of the said Joseph Beard, or there being such issue male at that time, they shall all die before they obtain their respective ages of twenty-one years, the testator's granddaughters, Elizabeth Beard and Mary Beard, will take like estates as tenants in common; and that in the event of their respective deaths, respectively leaving one or more son or sons then living, such son or sons of each will take the like estates in the share of his or their mother, if more than one, as joint tenants; or if only one of the testator's said two granddaughters should leave such son or sons, such son or sons

will take a similar estate in each share on the respective deaths of his or their mother and aunt. We are also of opinion that all the other devises of those estates are void. With respect to the other freehold estates devised in the first instance to the testator's grandson Joseph, we are of opinion, he, and after his death, his first son living at his death, will take the like estates therein as the grandson, John James Beard, and his first son, take in the freehold estates first devised. The opinion before given on the further limitations of the first devised freehold estates, will apply to the further limitations of this second class of estates, and in like manner our opinion on this second class will apply to the devises of the third and fourth classes, changing only the order in which the parties are to take, according to the terms of the will.

J Mansfield, J. Heath,
S. Lawrence, A. Chambre.

28 November, 1812.

The Master of the Rolls, in consequence of what Lord Alvanley, M. R., had said in *Thellusson* v. *Woodford*, 4 Ves. Jun. 377, "That the period of twenty-one years had never been considered as a term that might at all events be added to such executory devise or trust;" entertained doubts whether this court had not gone too far in holding all the limitations good that could take place during a life or lives in being, or within twenty-one years afterwards, and therefore ordered that the court should be again attended with the case, with the following additional question. How far the limitations over in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they should all die before they attained their respective ages of twenty-one years without lawful issue male, were affected by the circumstance, that they were to take effect at the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, or by the circumstance that there might be issue of John James Beard living at his death, to whom the estate was given by the will, but who would be incapable of taking according to the above certificate, for whose death under twenty-one, the limitation over in the event before mentioned must await?

The case was argued again in Easter Term, 1812, by *Shepherd*, Serjt., for the plaintiff, and by *Best*, Serjt., for the defendants.

Cur. adv. vult.

The court on the first day of Michaelmas Term, 1813, sent to the *Master of the Rolls* a copy of the following certificate upon the additional query: —

Having heard the arguments of counsel in this case, we are of opinion that the limitations over in the event of there being no son or sons of John James Beard, nor issue male of such son or sons, living at the

death of John James Beard, or, there being such issue male at that time, they shall all die before they attain their respective ages of twenty-one years without lawful issue male, are not affected by the circumstance that they are to take effect at the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take, nor by the circumstance that there may be issue of John James Beard living at his death, to whom the estate is given by the will, but who would be incapable of taking according to the former certificate from the judges of this court, for whose death under twenty-one, the limitation over in the event before-mentioned must await.

J. MANSFIELD, J. HEATH,
A. CHAMBRE, V. GIBBS.

The case was afterwards sent by *Lord Eldon*, C., for the opinion of the Court of King's Bench. The following questions were submitted by the Lord Chancellor for the opinion of that court: —

First, what estate and interest did John James Beard, the grandson and heir-at-law of John James the testator, take in the freehold estates, and what estate and interest in the leasehold estates under the testator's will?

Secondly, whether all or any, and which of the limitations in the testator's will subsequent and expectant upon the limitation to John James Beard, for ninety-nine years, if he should so long live, were void and contrary to law; or whether any, and which of such limitations were good and effectual, and particularly with reference to the circumstance that the limitations over (in the event of there being no son or sons of John James Beard, nor issue male of such son or sons living at the death of the said John James Beard, or there being such issue male at that time, they should all die before they attained their respective ages of twenty-one years without lawful issue male), were to take effect at the end of a term of twenty-one years after a life in being, at the death of the testator, without reference to the infancy of the person intended to take, and to the circumstance that there might be issue of John James Beard living at his death to whom the estate was given by the will, for whose death, under twenty-one, the limitation over in the event before mentioned, must await. This case was argued at the sittings before Michaelmas Term [1821], by

Sugden, for the plaintiff. There are two questions in this case; first, whether a gift for twenty-one years in gross, after a life in being, without reference to the infancy of the person who is to take, is void, as tending to a perpetuity; and, secondly, assuming the gift to Joseph Beard, standing by itself, to be valid, whether it and all the other limitations over, after the gift to the first unborn son of John James Beard, are not void. Here the gift is to John James Beard for ninety-nine years, if he shall so long live, and, after his decease, the second gift is to his first son, lawfully to be begotten, for the like term of ninety-nine

years, if he shall so long live, and to his issue in tail; but every one was to take for ninety-nine years only, *and then, in default of the issue of his first son*, to the second, third, fourth, and other sons, and their issue in tail, for the like estate. Now, the first gift to John James Beard is valid, being for a life in being; the second gift to his first son is also valid, because it must take effect within twenty-one years and a few months (allowed for gestation) after a life in being; but the gifts over to the issue of the first son, of John James Beard, are void, because possibly they may not take effect within twenty-one years and a few months after the determination of the life in being, viz., John James Beard; for, supposing John James Beard to die, leaving a son, and that son to marry at the age of twenty, and die under twenty-one, leaving a son; that son would not take the estate until he attained the age of twenty-one years; and, therefore, it would be unalienable until that time. The estate, therefore, would, by force of the limitations, be unalienable during the life of John James Beard; and if he died while his son was an infant of the age of one year, it would continue unalienable during the whole of his infancy, that is, for nearly twenty years, and if the latter married at twenty years of age, and died under twenty-one, it would continue unalienable during the life of that son, which would therefore be for a period of nearly forty years after a life in being. The gift, to the second and other sons of John James Beard, in default of the issue of his first son, is of course too remote and void, as tending to a perpetuity. The will then contains a clause that, "in case there shall be no issue male of J. J. B., nor issue of such issue male at the time of his death, or in case there should be issue male at that time, and they should all die, before they attain twenty-one, without lawful issue male, the estate is to go to Joseph Beard and his sons. There is no case in which it has been held that an executory devise may be limited to take effect twenty-one years after a life in being, without reference to the birth and infancy of the devisee who is then to take. The reason why twenty-one years and a few months are in such cases allowed as the period during which an estate may be unalienable is, in *Stephens* v. *Stephens* (Cas. temp. Talb. Forrester, 232; Vivian's MS. Lincoln's Inn Library), expressly stated to be, that strictly the power of alienation would not be restrained longer than the common law would otherwise restrain it, viz., during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity. In *Long* v. *Blackall*, 7 T. R. 102, Lord Kenyon says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age, the estate is unalienable." In *Crooke* v. *De Vandes*, 9 Ves. Jun. 197, a legacy given to the nephews and nieces of the testator, if at the end of

thirty years from his decease neither of his two grandsons (both living) had any grandchild living, was considered to be too remote, and therefore void. In *Thellusson* v. *Woodford*, 4 Ves. Jun. 337, Lord Alvanley said, "As to the period of twenty-one years, it has never been considered as a term that may at all events be added to an executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being, and twenty-one years, merely because a life may be an infant, or *en ventre sa mere*." These are authorities to show, that the period allowed by law, during which an executory devise may be limited to take effect, is derived by analogy from the period allowed in case of strict settlement. An executory devise, therefore, cannot be limited to take effect at the expiration of a term in gross of twenty-one years and a few months, after lives in being. For then the devisor would take the chance of the person who shall then become entitled, being an infant; in which case the power of alienation would be restrained longer than it would in the common case of a strict settlement.

Secondly, assuming the gift to Joseph Beard to be good standing by itself, still it and all the limitations over after the gift to the first unborn son of John James Beard, are void, because it was the intention of the testator that those limitations should take effect, only in case the previous limitations were capable of taking effect and had failed. The decisions in the case of an excessive execution of a power bear strongly upon this question. If a limitation be void as not authorized by the power, the remainders dependent upon it, which if given immediately would have been good, are not accelerated, but the limitations over are prevented from taking effect. *Alexander* v. *Alexander*, 2 Ves. 640; *Robinson* v. *Hardcastle*, 2 T. R. 241; *Brudenell* v. *Elwes*, 1 East, 442; *Routledge* v. *Dorril*, 2 Ves. Jun. 357. In this last case Lord Alvanley observes, "it would be monstrous to contend, that though it was appointed to the remainderman in failure of the existence of persons incapable of taking, yet notwithstanding they exist, he should take as if it was well appointed to them, and they had failed. It is given upon a contingency, upon which there was no right to give it." *Crompe* v. *Barrow*, 4 Ves. 681, is distinguishable from this case. There the gift was in the alternative, viz., to an object of the power in one event, in another not to an object of the power, and it was held, that on the happening of the former event, the gift was good. The power was to appoint to children, and the appointment was as to a moiety to a daughter, and as to the other moiety to a son for life, and upon his death, for his wife and children, and in case he should die without leaving a wife or child, then as to that moiety, to her daughter. And it was determined, that although the appointment to the wife and daughter was void, yet that as the event did not happen upon which that gift was to take place, it did not defeat the limitation over to the object of the power in the event provided for, and which did happen of the son's dying without leaving a wife or child surviving him. The same observation applies to the case of *Longhead* v. *Phelps*, 2 Black. 704. If indeed, the limitations over

were not wholly void, this consequence would follow, that there might be a person *in esse* entitled to take according to the words of the first limitation in the will, but incapable in law, and a remainderman *in esse* capable of taking by law, but incapable of taking, because the contingency has not happened which was to determine the preceding estate. As for example, suppose the gift had been to J. J. B. for ninety-nine years, if he should so long live; remainder to his first son for ninety-nine years, if he should so long live; remainder over in like manner to his issue successively; remainder to the other sons and their issue for ninety-nine years, determinable on their deaths; remainder to the heir-at-law of the testator, in fee, with an executory devise over as in this case to Joseph Beard. Now, the estates to John James Beard and to his first son are good, but the estates to the issue of the son, and to all the other sons after failure of the issue of the first son are void. Suppose that the first son of J. J. B. dies a month old, and then that he himself dies, leaving five sons, they and all their issue are cut out, because the limitations are too remote; but Joseph Beard is living, and desirous to take, yet is bound to wait the death of his five nephews without issue under twenty-one. It may be laid down as a general rule, that where a preceding particular estate is void on account of a perpetuity, the remainders dependent upon it are also void. It is clear, that the testator intended the prior estate to endure until the period when the limitation over was to take effect. The will, therefore, must be read as if the testator had expressly said, "I never mean Joseph Beard to take in derogation of the rights of the persons to whom the estate is previously limited." In *Proctor* v. *The Bishop of Bath and Wells*, 2 H. Bl. 358, there was a devise of an advowson in fee to the first or other son of B., that should be bred a clergyman and be in holy orders, but in case B. should have no such son, then to C. in fee. The first devise was held to be void as depending upon too remote a contingency, because the first or other son of B. could not take holy orders until he was twenty-four years of age, and the devise over as depending on the same event, was held to be also void, and the court said, that the will would not admit of the contingency being divided as was the case in *Longhead* v. *Phelps*, and there was no instance in which a limitation after a prior devise which was void from the contingency being too remote, had been let in to take effect; but the contrary was expressly decided in the House of Lords, in the case of *The Earl of Chatham* v. *Tothill*, 6 Bro. Ch. Ca. in Parl. 451. Although, therefore, no son was born, the devise over was held void.

Preston, contra. The 39 and 40 G. 3, *c.* 98, which passed in consequence of the case of *Thellusson* v. *Woodford*, 4 Ves. Jun. 227, may be considered as containing a legislative declaration of the law upon the head of objection, namely, the term of twenty-one years; for that Statute keeps within the boundary of the rule. It enacts, that "no person shall, by deed, will, or otherwise, settle or dispose of any real or personal property, so that the rents, issues, profits, or produce thereof shall

be wholly or partially accumulated, for any longer term than for the life or lives of such grantor, settlor, devisor, or testator, or the term of twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority of any persons who shall be living, or *en ventre sa mere*, at the time of the death of such grantor, &c., or during the minority of any person or persons, who, under the uses or trusts of the deed, will, or other assurances, directing such accumulations, would for the time being, if of full age, be entitled unto the rents, issues, and profits, or the interest or annual produce so directed to be accumulated." This is a legislative declaration that property may accumulate during a life in being, and twenty-one years after the death of the grantor, &c. A new qualification is now attempted to be engrafted on the rule, that the twenty-one years must be in respect of, and during the minority of the beneficial owner; but if a settlor may select a person who cannot alienate for twenty-one years, it follows, that the period during which the property may be unalienable, may be a term of twenty-one years in gross, without any reference to the minority of the next taker. The opinion of Lord Alvanley in *Thellusson* v. *Woodford*, against such direct period of accumulation, is a mere *obiter dictum*, not warranted by any authority, and opposed to those judicial opinions which allow that there may be a trust of accumulation or a suspense of ownership, for twenty or even thirty years. There are two sorts of gifts, viz., gifts to take effect by way of remainder, and gifts to take effect by way of substitution, or executory devise. A gift like the present might be too remote, if it were to take effect by way of remainder; but it does not therefore follow that it may not be good by executory devise, if it may operate in that mode. It may be admitted, that life estates to persons *in esse*, cannot be limited, except for lives *in esse*; nor can there be a perpetual series of life-estates; therefore, an estate cannot be limited to A. for life, remainder to his first (unborn) son for life, remainder to a grandson, being the son of such first son, for life, or even in tail or in fee, so as to be valid in favor of the grandson. In the case before the court, the subsequent gifts are not remainders. They are limitations for a term of years determinable, and, therefore, may operate by way of executory devise; and it is clear, that every executory devise which may vest within the period of a life or lives in being and twenty-one years is good. In *Scattergood* v. *Edge*, 1 Salkeld, 229, it was held, that an executory interest to arise within a reasonable time was good, and that twenty, nay thirty years had been thought a reasonable time. So it is, if within the compass of a life or lives, for let the lives be ever so many, there must be a survivor, and it is, at the utmost, only the length of that life; and Lawrence, J., in *Thellusson* v. *Woodford*, 4 Ves. Jun. 313, lays down the same rule. In *Gee* v. *Audley*, 2 Ves. Jun. 365, there was an appointment by will of £1000, in default of issue of Mary Hall, equally to be divided between the daughters living, (viz. at the failure of issue) of John Gee and Elizabeth his wife. Lord Kenyon said, "that neither real nor personal estate can be so

settled as to be tied up beyond lives in being, and twenty-one years and a few months afterwards; that if the expression in that will had been daughters "*now* living," or "living *at my death*," it would have been good; but that as it stood, it might be to those born afterwards. The vices of this gift were the contingency, and the possible suspense for more than twenty-one years after the death of a life in being.

Secondly, assuming the limitations to all the unborn sons except the first, are void, then the limitation to Joseph Beard, and the subsequent limitations, as far as they are within the compass of the rules against perpetuities, are accelerated, and Joseph Beard was entitled to take immediately on the determination of the estate limited to John James Beard and his first son. Besides, even though this gift be in itself too remote, and therefore void as far as it is by way of remainder, it may be good and have effect in the contingency which is expressed, being an event which is within the limits of the rule against perpetuities. In *Longhead* v. *Phelps*, 2 Sir W. Black. 704, a trust of a term to arise on a contingency, that A. and B. should die without leaving issue male, or that such issue male should die without issue, was held to be too remote in one event, and good in the other event (being the event which happened), viz., A. and B. having had a son, who died without issue in the lifetime of the survivor. And in *Crompe* v. *Barrow*, 4 Ves. Jun. 681, it was decided, that an appointment which exceeded the power by a limitation to objects not within the power, was void only as to the excess. The power was to appoint to children, and the appointment was to a child for life, and after his decease to his wife and children. That void limitation, however, did not defeat or exclude a limitation over to an object of the power, limited expressly on the event that such child should die without leaving a wife or child surviving him. This case is an authority to show, that a void limitation does not defeat a subsequent limitation, which is by express language brought within the limits of the rule against perpetuities. That is precisely the same case as this, for, in this case, the express provision, that there shall be no issue of such issue male living at the time of his (John James Beard's) death; also the contingency in case there shall be such issue male *at that time*, and they shall all die before they respectively attain their respective ages of twenty-one years, without lawful issue male, severally give the property in an event which does not infringe on the rule against perpetuities; consequently no rule of law, connected with the learning of perpetuities, denies effect to such a gift.

Cur. adv. vult.

The following certificate was afterwards sent: —

This case has been argued before us, and we are of opinion, that John James Beard, the grandson and heir-at-law of John James the testator, took, under the said testator's will, an estate for ninety-nine years, determinable with his life, in the freehold estates devised to him, in the first instance; and also in the leasehold estates devised, if they

should so long continue, and that, upon his death, leaving one or more sons, his first son will take an estate for ninety-nine years, determinable with his life, in the freehold estates, and what shall then remain of the terms for which the leasehold estates are held. We are also of opinion, that all the limitations subsequent and expectant upon the limitation to the first son of John James Beard, are void.

C. Abbott, J. Bayley,
G. S. Holroyd, W. D. Best.

The case then came on in Chancery, before *Lord Eldon*, C., for further directions.

Mr. Hart and *Mr. Stephen* contended, that the Court of King's Bench had not returned a sufficient answer to the case; and that it could not be collected from their certificate, whether the circumstance that the limitations were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, created such a suspense of the vesting as to render the limitations void.

Mr. Sugden, for the plaintiff, insisted that the conclusion to which the Court of King's Bench had come involved the decision of the point.

The Lord Chancellor. It is impossible that the Court of King's Bench should not have considered that point. The certificate of that court appears to me to afford a substantial answer to the questions put; and, under the circumstances of this case, I think the best thing I can do is to confirm it, and thus to help the case to the House of Lords, if the parties think it right to take it there. The inclination of my opinion is that the Court of King's Bench is right.

Certificate confirmed.[1]

CADELL *v.* PALMER.

House of Lords. 1833.

[*Reported* 1 *Cl. & F.* 372.]

Henry Bengough, Esq., by his will, dated the 9th of April, 1818, gave and devised, from and after the decease of his wife, Joanna Bengough, his messuage with the gardens, stables, and other appurtenances belonging thereto, situate in St. James's Square, Bristol, to the Rev. Charles Lucas Edridge, Arthur Palmer, the Rev. Cadell Edridge, and George Wright, their heirs and assigns forever, upon trust, for sale; and directed the proceeds to sink into and become part of his personal estate. He further gave and devised to the said trustees, their heirs and assigns, certain other real estates, upon trust, to permit his wife

[1] See *Monypenny* v. *Dering*, 2 De G. M. & G. 145; Gray, Perpetuities, §§ 184, 185, 251–257.

to occupy a part thereof during her life, and, after her decease, to pay out of the rents and profits an annuity of £300 to his nephew, George Bengough, for life, and an annuity of £200 to his nephew, Henry Bengough, for life; and subject to the payment of the said annuities, and otherwise subject, as in the said will mentioned, upon trust, from time to time, during the term of twenty-one years, to be computed from the day of the testator's decease, to collect and receive the rents and profits of all his real estates so devised to them (except the house in St. James's Square); and from time to time during the continuance of the said term to lay out the moneys to arise from such rents and profits in the purchase of freehold estates of inheritance in England, when and as often as there should be a surplus in hand amounting to the sum of £1500. And he directed the estates so to be purchased to be conveyed to the trustees, upon the same trusts and conditions as were thereinafter[1] limited concerning his estates thereinbefore devised; and that the trustees should not permit more than £500 to remain in bankers' hands, but should invest the same in the three per cent consolidated bank annuities until a convenient purchase could be found, and add the interest to the principal, to accumulate during the said term in the same manner as the rents and profits of the real estate were before directed to accumulate; and as to all the said trust estates and hereditaments so by him thereby devised (except his said messuage in St. James's Square), upon trust, that the trustees for the time being should retain and stand possessed of the same during the term of one hundred and twenty years, to commence from his death, if his said nephews, George Bengough and Henry Bengough, his nephew, James Bengough, his great nephews, Henry Ricketts the younger, and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, his great niece, Ann Ricketts the younger, the ten children then living of the said Charles Lucas Edridge (for whose names a blank was left in the will), and the eleven children then living of the said Arthur Palmer (whose names were mentioned), or any or either of his said nephews and niece, and great nephews and great niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of twenty years, to be computed from the expiration or other sooner determination of the said term of one hundred and twenty years determinable as aforesaid, nevertheless upon trust for his said nephew, George Bengough, for a term of ninety-nine years, if he should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue; and from and after the expiration or other sooner determination of the said term of ninety-nine years, then in trust for the first, second, third, fourth, fifth, sixth, and all and every other and subsequent born son of the same George Bengough, severally and suc-

[1] See the report of this case under the title of *Bengough* v. *Edridge*, 1 Sim. 273, where the Vice-Chancellor ordered "hereinbefore" to be substituted for "hereinafter." That part of the decree is not appealed from. — Rep.

cessively, according to the priority of their births: and after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who, in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person respectively should so long live; and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue, every elder of the same sons, and the person who for the time being and from time to time should answer, or who, in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body.

The testator then declared several successive trusts of the said estates during the said terms of one hundred and twenty years and twenty years, in favor of his nephews, Henry Bengough and James Bengough, his great nephews, Henry Ricketts the younger, and Richard Ricketts the younger, his niece, Ann Elizabeth Bengough, and his great niece, Ann Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who in case of the death of their respective parents would be heirs male of such sons respectively, similar to the trusts before stated to have been declared in favor of the said George Bengough, and his first and other subsequent born sons, and of the person who for the time being should be, or who in case of the death of his parent would be, heir male of the body of each of the same sons respectively, except that he directed that the estates of the said Henry Ricketts and Richard Ricketts, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies; and also the estates of the said Ann Elizabeth Bengough and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates. And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively who for the time being and from time to time should answer the description of the testator's heir or right heirs-at-law; and if there should be more than one,

in the same proportions, as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of one hundred and twenty years and twenty years, or either of them, should so long continue.

The testator further directed that each of the said terms of ninety-nine years should be computed from the time when the person or persons respectively to whom the same were limited should become entitled to the income of all or any part of the said trust estates, under the limitations thereinbefore contained; and that in case the said limitations in favor of persons unborn could not take effect precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be then born, in that case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her, or their actual birth, or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of one hundred and twenty years and twenty years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail, or in fee in them, if the same had by his will been devised, settled, or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Henry Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cesser of the estates of the said Henry Ricketts and Richard Ricketts, and their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cesser of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for

the time being should make a like refusal with reversion to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates as he or they would at that time be entitled to take under the said limitations, if the same had been actually made by his will, with the same or the like remainders over as if the said trust estates had been devised by his will in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, that no such person should have or be entitled to a vested estate or any other than a contingent interest until the expiration or sooner determination of the terms of one hundred and twenty years and twenty years; and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gift to, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof, he directed that during the said terms of one hundred and twenty years and twenty years, no person or persons should be entitled, at law or in equity, to any beneficial estate in his said trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as before mentioned, and that, in the events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. And he directed, that if at any time during the said terms of one hundred and twenty years and twenty years, each of the male persons who for the time being should be entitled to the income of his said trust estates should require the same, it should be lawful for his trustees to convey to each or any person making such request the said trust estates, or part thereof, as he should be entitled to under the limitations thereinbefore contained, for an estate of freehold for the life of the same person, so as to give him or her an estate of freehold instead of an estate for ninety-nine years.

The testator, after giving various other directions and powers concerning the said trust estates, and after bequeathing several legacies and annuities, gave and bequeathed to the said trustees, their executors and administrators, all the residue of his personal estate whatsoever, upon trust, that they should either continue his moneys upon the securities upon which they should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money, or securities for money. And he directed that, during the term of twenty-one years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest, and annual income of all his residuary estate, and from time to time during such term invest all such dividends, interest, and income, and the accumulations of the same, in their names, either in the three per cent consolidated bank annuities, or upon mort-

gages of freehold hereditaments in Great Britain, as they should think proper, as an accumulating fund, in order to increase the principal of his residuary estate during such term of twenty-one years; and should, with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee-simple, in England or Wales, when eligible purchases should arise; which estates, so to be purchased, should be conveyed unto and to the use of the trustees, in fee, upon the same trusts, and under and subject to the same and the like powers, provisos, and limitations as were by him thereinbefore declared, concerning his said estates devised to them in trust as thereinbefore mentioned, or as near thereto as the death of parties, the change of interests, and other contingencies would admit; and he appointed his said trustees to be executors of his said will.

The testator died in April, 1818, and his three first-named trustees and executors shortly afterwards proved his will, and became his legal personal representatives, George Wright having renounced probate, and executed a deed of disclaimer to them as to the trust estates.

Ann Ricketts, the testator's only sister, and next of kin at the time of his death, died in the month of October, 1819, having by her will appointed the respondents, W. P. Lunell, J. E. Lunell, and George Lunell executors thereof; and they proved the same, and became her legal personal representatives.

Mrs. Bengough, the testator's widow, died on the 10th of June, 1821, having duly made and published her will, and appointed as executors thereof the said Rev. Charles Lucas Edridge (since deceased), and Thomas Cadell, the appellant, who duly proved the same, and thereby became her legal personal representatives.

George Bengough, the testator's nephew, and first taker of an estate under the limitations in the will, filed his bill in Chancery in the year 1821 (amended in 1823) against the acting trustees and executors, and against the said Henry and James Bengough, Henry and Richard Ricketts, Ann Bengough, and Ann Ricketts, the younger, and also against the said personal representatives of Joanna Bengough, the widow, and of Ann Ricketts, the sister, of the testator; and after stating the said will and his own rights under it, and as heir-at-law and one of the then next of kin of the testator, he prayed (amongst other things) that the will might be declared to be well proved, and that the trusts thereof, so far as the same were good in law, might be decreed to be carried into execution, and that an account might be taken of the personal estate and effects of the testator, and of his funeral and testamentary expenses, and debts and legacies; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law; and as far as the same were ineffectual in law, then to such person or persons as would, in such case, by law be entitled thereto: and that an account might be taken

of the testator's real estate, and of the rents received by the trustees; and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as the same were good in law; and that the court would be pleased to declare how far the trusts of the real and personal estate were good; and as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate; but, in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees in possession, as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, and that the annuities of the plaintiff and Henry Bengough might be paid out of the rents and profits that had accrued, and should accrue after her death; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales; and that such estates, when purchased, might be conveyed to the trustees upon the trusts declared of the estates so to be purchased; and that, as often as there should be the sum of £1500 arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates as aforesaid; and that the plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased, for the term of ninety-nine years, if the plaintiff should so long live, such term to be computed from the death of the testator; and that in case the said rents and profits should not, as soon as they amounted to £1500, be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to £1500, until the same should be laid out in the purchase of freehold estates; or that, in case the said trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the trusts were invalid.

The defendants having put in their answer to the bill, the cause came on to be heard before the *Vice-Chancellor* in 1823, when an order of reference was made to the master, who, in pursuance thereof, reported that the plaintiff was, at the time of the death of the testator, and then was, the heir-at-law of the said testator, and that the said Ann Ricketts, deceased, the sister of the said testator, was his only next of kin at the time of his death, and that William P. Lunell, J. E. Lunell, and George Lunell, were then her legal personal representatives, and the only persons, who, together with the plaintiff, and the said Henry Bengough, James Bengough, and Ann Elizabeth Bengough (the children of the said testator's late brother, George Bengough), and the said Charles Lucas Edridge, and the appellant, the executors of Joanna Bengough, the widow of the said testator, would in case of intestacy have been entitled to distributive shares of the personal estate of the testator.

Upon the death of James Bengough, the suit was revived against Sarah Bengough, his widow and personal representative; and William Ignatius Okely, having married Ann Elizabeth Bengough, was subsequently made a party to the suit.

The cause having come on to be heard, on further directions, before the *Vice-Chancellor*, his Honor, by a decree, bearing date the 24th day of January, 1827, ordered it to be declared (amongst other things) that the testator's said will ought to be established, and the trusts thereof carried into execution, &c. His Honor, in giving his judgment in respect of that part of his decree, said, "that although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years were allowed in respect of the infancy of a tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being."

From this part of the decree the personal representative of the testator's widow appealed to the House of Lords, and the appeal came on for hearing in February, 1832.

Sir Edward Sugden and *Mr. Lynch*, for the appellant.

Mr. Preston and *Mr. Wilbraham*, for the respondents.

The learned judges who attended were J. A. Park, Littledale, Gaselee, Bosanquet, Alderson, J. Parke, and Taunton, JJ.; Bayley, Vaughan, Bolland, and Gurney, BB.; and the following were the questions submitted to them: —

First, whether a limitation, by way of executory devise, is void, as too remote, or otherwise, if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

Secondly, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with a number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

Thirdly, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*.

The learned judges attended again on a subsequent day (June 25th), and Mr. Baron Bayley delivered their opinion as follows: first, in answer to the first question: — I am to return to your lordships the

unanimous opinion of the judges who have heard the argument at your Lordships' bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd* v. *Carew*, 1 Show. P. C. 137, in the year 1696, and *Marks* v. *Marks*, 10 Mod. 419, in the year 1719, established the point, that for certain purposes, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose, in each of those cases, was, to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being is not the limitation; that there are cases in which it may be exceeded. *Taylor* v. *Biddal*, 2 Mod. 289 (1677), is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of twenty-one; there might be an interval, therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heir should attain twenty-one, till which time the estate was not to vest: and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens* v. *Stephens*, Cas. temp. Talb. 232. That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of twenty-one years, his heirs and assigns forever;" and the judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor* v. *Biddal*, and says, "that however unwilling they might be to extend the rules laid down for executory devises beyond [redacted] rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years; and, considering that the power of alienation would not be restrained longer than the law would restrain it, viz., during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity; and considering that such construction would

make the testator's whole disposition take effect, which otherwise would be defeated; they were of opinion that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. These decisions, therefore, do not distinctly or necessarily establish the position, that a term in gross for twenty-one years, without any reference to infancy, after a life or lives *in esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle* v. *Wood*, Willes, 213; s. c. 7 T. R. 103 *n.*, Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress of late years. He says: "The doctrine of executory devises has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints, to prevent perpetuities. At first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, viz., to a child *en ventre sa mere*, at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in *Thellusson* v. *Woodford*, 1 N. R. 388, Lord Chief Baron Macdonald prefaces it by this eulogium: "The result of all the cases is thus summed up by Lord Chief Justice Willes, with his usual accuracy and perspicuity." He does, indeed, afterwards say, 1 N. R. 393, after noticing *Long* v. *Blackall*, "the established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of the posthumous child;" and that rather implies that he thought the rule was confined to cases of minority. This opinion of Willes, C. J., though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person *in esse*, without reference to any minority, had been allowed; and, though there be no such case reported, it does not follow that none such was decided. In *Goodman* v. *Goodright*, 2 Burr. 879, is this passage: "Lord C. J. Mansfield, says, 'it is a future devise, to take place after an indefinite

failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being, and twenty-one years after,' which is the line now drawn, and very sensibly and rightly drawn." This was published in 1766; and, whether the last approving paragraph was the language of Lord Chief Justice Mansfield or the reporter, it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth* v. *Thirkell*, 3 Bos. & Pul. 654 *n.*; s. c. 10 B. Moore, 238 *n.*, Lord Mansfield says, "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being, and twenty-one years afterwards." In *Jee* v. *Audley*, 1 Cox, 325, Lord Kenyon (Master of the Rolls) says, "The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of judges of all times, from the *Duke of Norfolk's Case*, 3 Chan. Ca. 1, to the present time; it is grown reverend by age, and is not now to be broken in upon." In *Long* v. *Blackall*, 7 T. R. 102, the same learned judge says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and until the person, to whom the last remainder is limited, is of age, the estate is unalienable. In conformity to that rule, the courts have said, so far we will allow executory devises to be good." And, after referring to the *Duke of Norfolk's Case*, he concludes, "It is an established rule, that an executory devise is good, if it must necessarily happen within a life or lives in being, and twenty-one years, and the fraction of another year, allowing for the time of gestation." In *Wilkinson* v. *South*, 7 T. R. 558, Lord Kenyon says, "The rule respecting executory devises is extremely well settled, and a limitation, by way of executory devise, is good, if it may (I think it should be, must) take place after a life or lives in being, and within twenty-one years, and the fraction of another year afterwards." We would not wish the House to suppose, that there were not expressions in other cases about the same period, from which it might clearly be collected, that minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being, and twenty-one years afterwards. It is difficult to suppose, that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule, as they did, without expressing

minority as a qualification of the limit, particularly when, in many of the instances, they had minority before their eyes, had it not been their clear understanding, that the rule of twenty-one years was general, without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (2 Bl. Com. 16th ed. 174), puts as the limits of executory devises, that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being, or within a moderate term of years; for courts of justice will not indulge even wills, so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in is, that of a life or lives in being, and twenty-one years afterwards; as, when lands are devised to such unborn son of a *feme covert* as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is, the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearne, in his elaborate work upon Executory Devises, lays down the rule in the same way: "An executory devise, to vest within a short time after the period of a life in being, is good;" as in *Lloyd* v. *Carew*, which he states, and *Marks* v. *Marks;* and he says, "The courts, indeed, have gone so far as to admit of executory devises, limited to vest within twenty-one years after the period of a life in being;" as in *Stephens* v. *Stephens*, *Taylor* v. *Biddal*, *Sabbarton* v. *Sabbarton*, Cas. temp. Talb. 55, 245, all of which he states, and in all of which the vesting was postponed on account of minority only; and then he draws this conclusion, "That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates." The instances put, all instances of minority, might certainly have suggested that it was in cases of minority only that the twenty-one years were allowed; but, by stating it generally, as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was Mr. Fearne's understanding, may be collected from many other passages in his book; but from none more distinctly than in the third division of his first chapter on executory devises, (9th ed. 399, 401), where, after having mentioned as the second sort of executory devises, those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee, and after putting several instances, he then concludes the division thus: "And the case of a limitation to one for life, and, from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the second branch of the general distribution of executory devises." And in his third chapter (page 470),

he begins his eighth division with this position: "It is the same (that is, that an executory devise is not too remote) if the dying without issue be confined to the compass of twenty-one years after the period of a life in being." And in the eighth division of the fourth chapter (page 517) he says, "It seems now to be settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding limitations which would carry the whole interest happens to vest." The opinion of Mr. Fearne is continued in the different editions, from the period when his work was first published, in 1773, down to the present time; but, upon that expression which occurs in *Thellusson* v. *Woodford*, 4 Ves. 337, showing that a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule; but, instead of that, he seems to have intimated, that his opinion was in conformity with it; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard* v. *Westcott*, 5 Taunt. 393, the question, whether an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being at the death of a testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. Grant, the then Master of the Rolls; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated; and, lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that court. The first certificate was in November, 1812; the next in November, 1813; and the judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench, and that court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity exist-

ing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard* v. *Westcott*, and the *dicta* by L. C. Justice Willes, Lord Mansfield, and Lord Kenyon, and the rules laid down in Blackstone and Fearne, we consider ourselves warranted in saying that the limit is a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the *dicta* or text writers I have mentioned; and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mere*, the unanimous opinion of the judges is, that such a limitation would be void, as too remote. They consider twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists.

The Lord Chancellor. I shall move your Lordships to concur in the opinions expressed by the learned baron, as the unanimous resolutions of the judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule. That rule was originally introduced in consequence of the infancy of parties; but whatever was its beginning, it is now to be taken as established by the *dicta* of the judges from time to time. A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd* v. *Carew*, 1 Show. P. C. 137, settled the rule; for the whole question was there gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned baron from Mr. Fearne's book,

without seeing that it was the settled opinion of that eminent person, that twenty-one years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice Buller's opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. Fearne had done. The opinion of Lord Mansfield was the same, and the doctrine is not weakened by what Lord Kenyon is stated to have said in *Long* v. *Blackall*, 7 T. R. 100. In the opinion of all, the rule was clearly confined to twenty-one years, as the period now understood. It was, however, necessary to state the first question, for the opinion of the judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, to which the learned judges also applied themselves, and they have excluded the period of gestation beyond the term of twenty-one years, except where the gestation actually exists. If your Lordships be of the same opinion, you will affirm the judgment of the court below, and dispose of this case. The rule will then be, that a limitation will not be too remote, if the vesting be suspended for twenty-one years beyond a life or lives in being; but that beyond that period it would.

The judgment of the court below was affirmed.

SOUTHERN *v.* WOLLASTON.

CHANCERY. 1852.

[*Reported* 16 *Beav.* 276.]

THE testator, by his will dated in 1835, bequeathed £400 Consols to trustees, upon trust for his cousin Edward Wollaston for life; and after his decease, upon trust to assign and transfer, or pay, distribute and divide the same *unto and equally between all and every the children and child* of Edward Wollaston who shall be living at his decease, and *who should then be of or afterwards live to attain the age of twenty-five years*; if more than one, in equal shares.

There was a gift over, in case there should be no child living at his death, or of their all dying under twenty-five. And the testator directed, that after the decease of Edward Wollaston, and while any of the persons presumptively entitled thereto should be under the age of twenty-five years, the dividends of the shares of the persons so, for the time being, under that age in the £400, should be applied towards the maintenance and education of the person to whom the said stock moneys should, for the time being, under his will presumptively belong.

The testator died in 1845. Previous thereto, and in 1837, the legatee Edward Wollaston had died, leaving eleven children; four only survived the testator, and the youngest attained twenty-five in 1848.

A question was raised, at a former hearing (16 Beav. 166), whether this gift to the class of children was or was not void for remoteness; and the point not having been fully argued, the impression of the court then was, that it was void, but permission was obtained to argue the point.

Mr. Lloyd and *Mr. Bilton* now appeared for the children. They argued as follows: The will speaks as at the testator's death. This legacy is therefore free from all objection in regard to remoteness, for the tenant for life was then dead, and his children ascertained; and as they were all more than four years of age the legacy of necessity vested within due limits, that is, within twenty-one years from the testator's death. In *Williams* v. *Teale* 6 Hare, p. 251, Sir James Wigram expressed his opinion on the very point. He says, "A third point, upon which my mind is also made up, is this: — that, in considering the validity of the limitations in this will, with reference to the state of the testator's family, the state of the family must be looked at, as it existed at the time of the death of the testator, and not as it existed at the date of the will. If a testator should give his property to A. for life, with remainder to such of A.'s children as should attain twenty-five years of age, and the testator should die, living A., there is no doubt but that the limitations over to the children of A. would be void, *Leake* v. *Robinson*, 2 Mer. 363; but if, in that case, A. had died living the testator, and at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any court of justice would exclude them from the benefit of the bequest, on the ground only, that if A. had survived the testator, the legacy would have been void, because the class in that state of things could not have been ascertained." [1]

Mr. R. Palmer, *Mr. Rogers*, *Mr. Roupell*, *Mr. Rendall*, *Mr. Shebbeare*, *Mr. Bird*, *Mr. Sheffield*, and *Mr. Thring*, for other parties.

The Master of the Rolls [Sir John Romilly] said he should follow the case of *Williams* v. *Teale*, and declare that the gift to the children was not void for remoteness.

[1] The rest of the remarks of Wigram, V. C., in *Williams* v. *Teale*, 6 Hare, 239, 251 (1847), on this point is as follows: "I have noticed this point because I find that an intelligent writer (I allude to Mr. Lewis, in his book of Perpetuities) has expressed a contrary opinion in his observations on the case of *Vanderplank* v. *King*, 3 Hare, 1, and has upon that ground doubted the correctness of my decision in that case. In another part of the same book, the cases upon which he founds his opinion are collected and commented upon; but upon examining those cases, it appears to me that none of them (as it is in terms admitted) is inconsistent with the opinion I have expressed. I have considered the point with much attention, and I am clear that the question to be considered is, How the family stood at the death of the testator, and not how it stood at any earlier date."

AVERN *v.* LLOYD.

CHANCERY. 1868.

[*Reported L. R. 5 Eq.* 383.]

THIS cause came on to be heard on further consideration and on a petition.

Joseph Wright, by will, in March, 1780, after directing his executors, as soon after his decease as might be convenient, to sell all his effects, and to invest the proceeds in some of the public funds, directed them to pay one moiety of the dividends to arise from such funds to his brother Francis for life, and after his decease to the issue male of his brother Francis equally, share and share alike, for their lives and the life of the longer liver, and after the decease of the survivor, or in case there should be no such male issue of his brother Francis, to pay such moiety of the dividends to his brother John Wright for life, and after his decease to his issue male equally, share and share alike, for their respective lives and the life of the longer liver; and after the decease of the survivor, or in case there should be no such issue male of his brother John, then to all and every the daughters and daughter of his brother Francis equally, share and share alike, for their respective lives, and to the survivors and survivor; and after the decease of the survivor of such daughters and daughter of his brother Francis, he bequeathed the moiety of the funds and the dividends thereof to the executors, administrators, and assigns of the survivor of his brothers John and Francis, or their issue, male or female, who should happen to be such survivor. The testator directed his executors to pay the other moiety of such funds to his brother John for life, and after his decease to pay the dividends of such moiety to his issue male for their lives and the life of the longer liver; and after the decease of the survivor, or in case there should be no such issue male of his brother John, to his brother Francis for life, and after his decease to his issue male equally, for their lives and the life of the longest liver; and after the decease of the survivor, or in case there should be no such issue male of his brother Francis, then to all and every the daughters and daughter of his brother Francis equally, for their lives and the lives of the survivors and survivor, and after the decease of the survivors and survivor of such daughters and daughter of his brother Francis, he bequeathed the last-mentioned moiety of such funds and the dividends to the executors, administrators, and assigns of the survivor of his brothers John and Francis, or their issue, male or female, who should happen to be such survivor.

The testator died in 1785.

Francis Wright died in 1801, leaving three sons, Joseph, John, and

Francis, and five daughters, of whom Ann intermarried with the defendant Robert Lloyd.

In March, 1815, in a suit instituted by the three sons against their uncle John and others, for the purpose of having their rights under the will declared, Sir W. Grant ordered the transfer into court by the uncle John of £1100 £3 per Cent Stock, and of £950 New South Sea Annuities, in trust in the cause "the account of the legatees for life;" that the costs should be taxed and paid out of a sale of sufficient of such stock; that one moiety of the dividends accruing on the residue of such stock until such sale, and on the residue after such sale, and one moiety of the dividends accruing on the annuities, should be paid to the three plaintiffs in equal shares during their joint lives, and after the death of them, or either of them, that the whole of the dividends of the last-mentioned money should be paid to the survivor during his life; and that the dividends accruing on the other moiety of the annuities should be paid to the uncle, John Wright, during his life, and that on his death and that of the survivor of the three plaintiffs, any persons entitled to the moieties of the stock and annuities were to be at liberty to apply to the court.

The funds were transferred into court, and by the payment of costs the stock was reduced to £764 13*s.* 8*d.*

The uncle, John Wright, died in 1818 without issue. In January, 1819, it was ordered in the cause that the whole of the dividends on the stock and annuities should be paid to the plaintiffs, Joseph, John, and Francis Wright equally. Joseph Wright died in 1820, and, on petition, it was ordered that the dividends should be paid to John and Francis in moieties. John and Francis sold their interests in the stock and annuities, and it was ordered that the dividends should be paid to their assignee during their lives and the life of the survivor. John Wright died in 1849. Ann Lloyd was the survivor of the five daughters of Francis, the brother of the testator. She died in 1842, and the defendant, her husband, became her legal personal representative.

Francis Wright, the survivor of the three plaintiffs above mentioned, died in April, 1856, and since that date no dividends had been paid to any person. Letters of administration to the effects of the said Francis were granted to his daughter, the plaintiff, Emma M. Avern, and she and her husband, in April, 1863, filed their bill praying for a declaration that she, as administratrix, was entitled to the funds in court, or, if not, that the rights of all parties under the will might be declared.

Mr. Smart (*Mr. Bacon*, Q. C., with him), for the plaintiffs.

Mr. Dickinson, Q. C., and *Mr. Millar*, for the defendant.

Mr. Crossley appeared for Mr. and Mrs. Winter.

Sir John Stewart, V. C. In this case there is no question as to the validity of the limitation of the life estates in remainder to the unborn issue, male and female, of the testator's brothers, John and

Francis. The unborn issue clearly take life estates, share and share alike. But it has been contended that the ultimate limitation to the executors, administrators, and assigns of the survivor of these tenants for life is too remote. The limitation is in these terms: "To the executors, administrators, and assigns of the survivor of his brothers John and Francis, or their issue, male or female, who shall happen to be such survivor." Considering that this limitation to the executors, administrators, and assigns must take effect in the lifetime of one of the unborn issue to whom a good estate for life is given, so as to give him an absolute estate in possession when he becomes survivor, it is not easy to see on what ground it can be considered as too remote. The gift to the executors, administrators, and assigns of the surviving tenant for life attaches to the life estate, so as to give a contingent absolute interest to each tenant for life. This contingent absolute interest vests in possession in the surviving tenant for life as soon as he is ascertained. It attaches the absolute interest as much to the life estate in the case of personal property as the rule in *Shelley's Case*, 1 Rep. 219, attaches the inheritance to the life estate in the case of a contingent limitation to the heirs or the heirs of the body of the tenant for life of a freehold estate, so as to make the heir take by descent when the contingency happens. Each of the tenants for life in this case had as much right to alien his contingent right to the absolute interest as to alien his life estate; and the person claiming under an assignment of the whole estate and interest of the tenant for life would, as soon as his assignor became the survivor of the other tenants for life, be entitled to the possession and enjoyment as absolute owner. It seems obvious that such a case is not within the principle on which the law against perpetuity rests, and that the limitation in question of the absolute interest does not fail as being too remote.

EVANS *v.* WALKER.

CHANCERY DIVISION. 1876.

[*Reported* 3 *Ch. D.* 211.]

JOHN BROWN, by his will, dated the 13th of February, 1812, made the following disposition of his property: "I give and bequeath unto Maria Evans £50 per annum from the day of my decease during the term of her natural life, and from and after her decease to the children she may have born in wedlock, equally to be divided between them, share and share alike, during their natural lives, the said annuity to be paid half-yearly; and from and after the decease of the survivors herein named to go to my nephew Edwin Walker, and my two nieces, Sally Brown Walker and Eliza Walker, equally between them, and I

hereby desire that my nephew and nieces will see it fulfilled. I declare this my last will and testament."

This suit was instituted in 1816 for the purpose of having a sum of money set apart out of the estate of the testator to answer the annuity of £50, and a sum of £1666. 13*s.* 4*d.* was accordingly paid into court for that purpose. Maria Evans died without having been married, in 1874. The nephew and two nieces of the testator died some time since, and a petition was now presented by their legal personal representatives to have the money paid out of court to them in equal shares.

W. Barber and *De Castro*, in support of the petition.

Hull, for the next of kin of the testator.

MALINS, V. C. The first point is, whether the gift to the nephew and two nieces of the testator is void for remoteness, and it is quite clear to my mind that it is not, because there is no objection to a gift to unborn children for life, and then to an ascertained person, provided the vesting is not postponed. That point I commented upon in *Stuart* v. *Cockerell*, Law Rep. 7 Eq. 363. Property may be given by will or secured by settlement to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided that the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons. Therefore the circumstance of there being life estates given to all the children unborn of Maria Evans does not create a perpetuity if there are persons capable of taking immediately, and here there are such persons. So they take immediate vested interests.

The next question is, what is the effect of this gift after the decease of the survivors of Maria Evans' children, "to my nephew Edwin Walker, and my two nieces Sally Brown Walker and Elizabeth Walker, equally between them." If he had intended them to take for life only, he would have used words similar to those used in the previous gift, and that shows that they were not to take for their lives, but to take absolutely. That is the construction I should put upon the will on principle, but the question is settled by the cases of *Stokes* v. *Heron*, 12 Cl. & F. 161, and *Bent* v. *Cullen*, Law Rep. 6 Ch. 235. The latter case is almost identical with this, for there the testator gave to his wife £50 a year to be paid out of the interest, dividends, and produce arising from his personal property, and after her decease he gave the said £50 to his two daughters and his granddaughter or the survivors, and it was held to be a gift to the survivors of the principal, which would produce the annuity of £50. I, therefore, understand the law to be, that when there is a gift of an annuity to one for life, or to several for lives, and then a gift afterwards to another person, without any restriction, that means that the last taker is to have the capital from which the annuity was produced; consequently this annuity being given to the nephew and two nieces generally, without any words of restriction, they take the capital absolutely. The order will be: — The

court being of opinion that the nephew and two nieces took the absolute interest in the capital equally as tenants in common, let the fund in court be paid to their legal personal representatives, — that is to say, one third to the representatives of the nephew, and one third to the representatives of each of the nieces.

ABBISS *v.* BURNEY.

COURT OF APPEAL. 1881.

[*Reported* 17 *Ch. Div.* 211.]

JESSEL, M. R.[1] This is an appeal from a decision of *Vice-Chancellor Malins* upon an important point of real property law. The first question is whether the rules as to remoteness apply to what has been termed an equitable remainder, where the legal estate has been vested in trustees under the same instrument which creates the equitable estate. The second question is, whether the limitation with which we have to deal in this case is an equitable remainder or an executory devise.

The gifts in the will, so far as relates to the real estate, may be stated very shortly. There was a devise of freehold estate to trustees and their heirs, vesting in them the legal fee upon trust to pay the rents to the testator's wife, Maria Finch, for her life, then upon trust that the trustees should, during the life of one Henry Mayer, who was then living, retain the rents for their own use, and after his death upon trust to convey the freehold estates of the testator unto such son of William Macdonald as should first attain the age of twenty-five years, his heirs and assigns, absolutely forever, subject to a condition as to taking the name and arms of the testator, and in the mean time he directed that the rents should accumulate for his and their benefit.

The only facts necessary to be stated are that William Macdonald was living at the death of the testator, and no son of his had then attained the age of twenty-five, but he had a son who, after the testator's death but during the lifetime of Maria Finch, attained the age of twenty-five. Maria Finch and Henry Mayer being both dead, the question now arises whether the limitation to the son of William Macdonald who should first attain the age of twenty-five years is or is not void for remoteness. The Vice-Chancellor decided that it is not void for remoteness on certain technical grounds which I will proceed to consider.

Of course, if this is a limitation by way of executory devise it is void for remoteness, the rule as to remoteness being that an executory devise, in order to be valid, must be such as necessarily to take effect within a life or lives in being at the death of the testator and twenty-one years afterwards. Now it is obvious that the limitation to the first son of

[1] The case is sufficiently stated in the opinion of JESSEL, M. R.

William Macdonald who attains the age of twenty-five years is not confined within the period of any life in being and twenty-one years afterwards.

The ground on which it was endeavored to support the gift was this: it was said that the gift to the son of William Macdonald was an equitable contingent remainder, and that according to the law of contingent remainders the estate could not take effect at all unless it was vested at the death of the survivor of Maria Finch and Henry Mayer, and that, therefore, it could not be void for remoteness, as it must take effect at the expiration of lives in being or not at all. The argument proceeded on the footing that the same rules which govern devises of legal estates in freeholds govern also devises of equitable estates, using the term equitable in the sense I have mentioned, and the Vice-Chancellor gave effect to that argument.

The first observation to be made upon that is, that these contingent equitable remainders, as they are sometimes called, do not stand upon the same footing as legal remainders. The reason why a contingent remainder under a legal devise failed, if at the death of the previous holder of the estate of freehold there was no person who answered the description of the remainder-man next to take, was the feudal rule that the freehold could never be vacant, for that there must always be a tenant to render the services to the lord, and therefore if the remainder could not take effect immediately on the determination of the prior estate, it never could take effect at all. This result of feudal rules was never held to apply to equitable estates, and it was sometimes said that the legal estate in the trustee supported the remainder. That was not the best mode of expressing the doctrine, the principle really being that as the legal estate in the trustees fulfilled all feudal necessities, there being always an estate of freehold in existing persons who could render the services to the lord, there was no reason why the limitations in remainder of the equitable interest should not take effect according to the intention of the testator. If at the time of the determination of the prior equitable estate of freehold there was no person capable of taking, a person afterwards coming into existence within the limits of the rule of remoteness, and answering the terms of the gift, was allowed to take. So that the doctrine of ascertaining once for all at the death of the tenant for life what persons were to take under the subsequent contingent limitations, had no application to equitable estates. Equity has not on this subject followed the law. According to my experience it has always been assumed, without argument, that where the fee is vested in trustees upon trust for a man for life, and after his death upon trust for such of his children as being sons shall attain twenty-one, or being daughters shall attain that age or marry under that age, and at the death of the tenant for life there are some children adult and some minors, the minors, if they live to attain twenty-one, will take along with the others; but if equity had followed the law, then, inasmuch as there were persons capable of taking at the death of the tenant

for life, namely, the adult children, they would have taken to the exclusion of the children who were minors, as was the case where the limitations were legal. It appears to me, therefore, that where the legal fee is outstanding in the trustees, that doctrine of contingent remainders which, until the recent Statute, prevented contingent remainders from taking effect at all unless they vested at the moment of the termination of the prior estate in freehold, has no operation, and on that ground I think this appeal should be allowed.

On the second point also I must differ from the conclusion arrived at by the learned judge of the court below. I cannot find that there is any equitable remainder to any child of William Macdonald. There is a gift to the trustees upon trust for the widow for life; then there is a direction to them to retain the rents for their own benefit during the life of Henry Mayer, which is not an equitable remainder, because they, having the legal ownership, cannot have a separate equitable estate. Then, on the death of Henry Mayer, there is a direction to them to convey the legal estate to the first son of William Macdonald who attains twenty-five. That direction to convey does not give the son of William Macdonald an equitable remainder expectant on a prior equitable life estate. There is no equitable life estate after the death of the widow, and the direction to the trustees to convey is nothing like a remainder. In my opinion, therefore, the gift to the son of William Macdonald is an executory limitation, and subject to all the rules with regard to executory limitations, and on this ground also I am of opinion that the decision appealed from ought to be reversed.

Cotton, L. J. I am of the same opinion. One point argued by Mr. Williams was that the attaining twenty-five years was not part of the description of the person to take, but that the gift was to be construed as a gift to the first son, with a gift over if he did not attain that age, and he referred to cases in which a violent construction of that kind has been put by the court upon devises of real estate so as to give effect to what was considered by the court to be the intention of the testator. I asked Mr. Williams whether that violent construction had ever been put upon a gift which included both real and personal estate, and he was not able to refer me to any such case. But, independently of that, how can it be said that in a gift to such son of William Macdonald as shall first attain the age of twenty-five years, the attaining that age is not part of the original gift and part of the description of the devisee. Where that violent construction has been put upon the words there has generally been some obscurity or ambiguity in the original gift, or there has been a gift over on the person not attaining the prescribed age. In the latter case, as Vice-Chancellor Wigram said, in the case of *Bull v. Pritchard*, 5 Hare, 567, 591, the court construed the testator as giving all he had to the first taker, except what he had given to the devisee over. But here there is no gift over of that kind, and the attaining of the age of twenty-five is an essential part of the description of the person who is to take.

Then, assuming this is not to be a vested interest before the son attains twenty-five, is the devise bad or not for remoteness? The Vice-Chancellor, as I understand him, proceeded on this ground. He said if there is a legal contingent remainder that remainder of necessity must be vested at the ceasing of the particular estate upon which it is limited or not take effect at all, and therefore, even although it is to a person if he attains twenty-five, yet, as it must vest at or before the determination of the prior life estate, there can be no question of remoteness, for if it ever comes into effect at all it must come into effect on the expiration of a life or lives in being. That no doubt is so, but how can that apply to limitations of this kind, where the testator, by his will, dealing with the legal estate and vesting it in trustees, has directed that they are to hold it in certain events and at certain times on particular trusts? The rule does not apply in equity, because in equity the feudal rules of tenure will not be allowed to defeat the trusts which the testator has declared by his will, and, even although at the termination of the particular estate the persons cannot be ascertained, yet the court will afterwards enforce the trusts in favor of persons who subsequently come into *esse* and answer the description of the objects of gift. It follows that the objection on the ground of perpetuity is not removed.

I quite agree with the Master of the Rolls that the question really does not arise here, because there is no limitation by way of remainder. The estate being given by the testator to trustees, he has directed that at a particular time their estate shall be put an end to by their conveying it away to somebody else. They are not directed to hold it upon trust for somebody else during his or her life and afterwards in trust for a remainder-man, but they, having the fee absolutely in themselves, are directed after a particular time to convey that estate from themselves, and to give the person then to be entitled the legal estate. Of course, if there be no objection on the ground of remoteness, equity would compel them to hold it after that particular time for the benefit of the person to whom they ought to convey, but as a matter of limitation in the will it is not a limitation of an equitable estate in remainder, it is merely a direction at a future time to convey the estate to somebody else. I am therefore of opinion that the question of contingent remainders really does not arise, and that the trust to arise here at a period beyond that allowed by the rules of perpetuity must be dealt with as an executory trust and not as an equitable remainder. In my opinion, therefore, the decision of the Vice-Chancellor is erroneous, and must be reversed.

Lush, L. J. I am of the same opinion. It is somewhat remarkable that there is no decision to be found expressly upon this point, but I may observe that it has been published as the opinion of very eminent text-book writers, and was assumed in *Blagrove* v. *Hancock*, 16 Sim. 371, as well by the counsel on both sides as by the learned Vice-Chancellor himself, that the doctrine as to excepting contingent remainders

from the rule as to remoteness is not applicable to equitable estates. The reason appears to be a very obvious one. The doctrine in question was founded entirely upon the requirements of the feudal law which necessitated that there should always be somebody in possession as tenant of the land to render service to the lord, and therefore if the contingent estate did not take effect at the time when the preceding estate ended, then it could not take effect at all; so that remoteness was out of the question. The courts of equity never interfered with that doctrine, but when they came to deal with the equitable limitations of real property, where the legal fee was given to trustees by the same instrument, so that there were persons always at hand to fulfil the requirements of the feudal law, the courts of equity dealt with those equitable limitations according to their own principles, and, disregarding the feudal law, to which there was no necessity to pay any attention, as its requirements were already satisfied, they carried out the intention of the testator by giving effect to the equitable limitations according to the terms of his will. But then came in another doctrine, founded on principles of public policy, that an estate cannot be tied up longer than for a life or lives in being, and for twenty-one years afterwards.

In this particular case the testator directed that the estate should be, after the death of Henry Mayer, conveyed by the trustees unto such son of William Macdonald as should first attain the age of twenty-five years, and the rents and profits of the estate were to be accumulated until he attained the age of twenty-five years. If, therefore, the eldest son of William Macdonald had been born in the year in which Henry Mayer died, the rents and profits of the estate might have been left to accumulate, and the vesting of the estate might have been postponed beyond the period of twenty-one years from the expiration of any life in being. I am therefore of opinion that the limitation to the son of William Macdonald is void for remoteness.

Davey, Q. C., and *Chapman Barber*, for the appellants.

Joshua Williams, Q. C., and *Knox*, contra.

LONDON & SOUTH-WESTERN RAILWAY CO. *v.* GOMM.

CHANCERY DIVISION AND COURT OF APPEAL. 1882.

[*Reported* 20 *Ch. Div.* 562.]

By an indenture, dated the 10th of August, 1865, made between the plaintiffs, the London and South-Western Railway Company, of the one part, and George Powell of the other part, after reciting that the plaintiffs were seised of the fee simple and inheritance of the piece or parcel of land and hereditaments intended to be thereby conveyed, "which being no longer required for the purposes of their railway," they had contracted to sell to the said George Powell (who was the

adjoining owner thereto), at the sum of £100, subject to the conditions hereinafter contained, the company conveyed to Powell in fee the piece of land in question, being a small piece of land situate near their Brentford Station. And Powell thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiffs, their successors and assigns, that he, the said G. Powell, his heirs and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed, and all other persons who should or might be interested therein, should and would at any time thereafter (whenever the said land might be required for the railway or works of the company) whenever thereunto requested by the company, their successors or assigns, by a six calendar months' previous notice in writing, to be left as therein mentioned, and upon receiving from the company, their successors or assigns, the said sum of £100 without interest, make and execute to the company, their successors and assigns, at the expense of the company, a reconveyance of the said hereditaments free from any encumbrances created by the said G. Powell, his heirs or assigns, or any persons claiming under or in trust for him or them.

The ten years limited by the 127th section of the Lands Clauses Consolidation Act, 1845, had expired in 1862, but the company had still power of purchasing land in this neighborhood by agreement.

The premises comprised in the above indenture were in the year 1879 sold and conveyed along with other property, by the son of George Powell to the defendant, who had full notice of the provisions of the deed of August, 1865. Uninterrupted possession of the land had been had by George Powell and his successors in title ever since the purchase in 1865.

On the 12th of March, 1880, the company gave notice in writing to the defendant claiming to repurchase the property under the provision in the deed of August, 1865. The defendant refused to reconvey, upon which the company commenced their action, alleging that the land in question was required for the purposes of their undertaking, and for the improvement of their railway and works, and claimed specific performance of the covenant in the deed of 1865.

The defendant by his defence alleged that he had purchased this land in the year 1879 after the death of G. Powell, and long after the period limited by the Lands Clauses Consolidation Act and other Acts under which the plaintiffs were incorporated for the absolute sale and disposal by them of all superfluous lands had expired, and that all estate and interest of the plaintiffs in the said lands had become vested in the adjoining owner when the defendant so purchased. That the condition or covenant in the deed of August, 1865, if and so far as the same purported to bind the land in the hands of succeeding owners, or to bind succeeding owners, was invalid, but if valid had ceased, and was at an end before the defendant purchased.

At the time when the company gave their notice to purchase this land from the defendant they had no compulsory power of purchasing

land in that neighborhood, but under the London and South-Western Railway Act, 1863 (26 & 27 Vict. c. xc.), § 24, and the London and South-Western Railway (General) Act, 1868 (31 & 32 Vict. c. lxix.), § 23, and others of their Acts, they still had power to purchase lands by agreement, under which this land might have been purchased if the defendant had been willing to sell it.

The action now came on for trial, and several engineers of the plaintiffs were examined as witnesses, who proved that the land in question was now required by the company for the purpose of extending the works connected with the station at Brentford, and, further, that in the year 1865, when the land was conveyed to C. Powell, there was a great probability that at some future period it would be so required.

The action came on to be heard before Mr. Justice Kay on the 28th of November, 1881.

Rigby, Q. C., and *Gosselee*, for the plaintiffs.

Whitehorne, Q. C., and *Vaughan Hawkins*, for the defendant.

1881, *Dec.* 2. KAY, J., after stating the effect of the deed of the 10th of August, 1865, continued: —

The defendant is an assignee of Powell with notice of the covenant. On the 12th of March, 1880, notice was given that the railway company required the land. The defendant refusing to convey, this action was commenced on the 22d of November, 1880, for specific performance of the covenant.

In opposition to the claim it is insisted: —

1. That the arrangement was *ultra vires* and void.

2. That the covenant to reconvey is void as tending to a perpetuity.

3. That the land is not required for the purposes of the railway.

On the last point I am satisfied by the evidence of the company's engineers, which according to *Stockton and Darlington Railway Company* v. *Brown*, 9 H. L. C. 246, and *Kemp* v. *South-Eastern Railway Company*, Law Rep. 7 Ch. 364, is conclusive, that the land is *bona fide* required for purposes within sect. 45 of the Railways Clauses Consolidation Act.

By their special Act of 1863, the company had in 1865 power to purchase this land for such purposes, and that power still exists under an Act obtained by them in 1868.

But it is argued that this was in 1865 superfluous land, and ought then to have been sold absolutely to Powell as the adjoining owner, and that this being a conditional sale was void. I am satisfied by the evidence that though not wanted at the time, there was in 1865 a strong probability that this land, which immediately adjoins the company's station at Brentford, would be required eventually, and therefore a prospective contract to purchase was I think within the powers of the company: *Kemp* v. *South-Eastern Railway Company*; *Hooper* v. *Bourne*, 5 App. Cas. 1. And it seems to me that the true effect of the transaction in 1865 was not a conditional sale, but a sale out and out to Powell, with a personal contract by him to reconvey when called

on at a certain price. Probably the price he had to pay was considerably less by reason of this covenant, and if the transaction was *ultra vires*, the proper thing to do would be to set the sale aside altogether, in which case the land ought to be reconveyed on payment back of the purchase-money. But I do not think it was a transaction beyond the powers of the company.

The remaining question is, whether this covenant is void as tending to a perpetuity.

Upon this branch of the argument two cases were referred to. The first of these is *Gilbertson* v. *Richards*, 4 H. & N. 277; 5 H. & N. 453.

In that case one Billings, being entitled to the fee simple of certain lands, agreed to sell them subject to the payment by the purchaser to him of £40 a year, for which he was to have a power of distress. Then he and the purchaser mortgaged the property by a deed which contained a proviso that if the mortgagee, or any one claiming under him, should ever enter into possession the premises should thenceforth be charged with the payment to Billings, his heirs and assigns, of the annual sum of £40. It was argued that this was void for remoteness. That argument was answered by Baron Martin, thus: "The second objection was that it was void for remoteness; that it was to arise at any time, however distant, when the parties of the fourth part, or their heirs, might enter into the land, and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity in an illegal sense. It is vested in Thomas Billings and his heirs. He or his heirs may sell it or release it at their pleasure. A rent in fee simple may be granted to a man and heirs to continue forever. Why, therefore, may not one be granted to commence at any time, however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed, but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure and as he or they think fit, we think it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant. For these reasons we think the rent was well created, and that the distress for it was lawful." In the Exchequer Chamber the same objection having been pressed, was thus answered by Mr. Justice Wightman, who delivered the judgment of the court: "The only question which remained for consideration was whether the second objection, founded on the law against perpetuities, was available in this case, and we are of opinion that it is not. We think that this rent is not liable to the objection as to perpetuity. The real effect of the limitations in the deed before us is, that the mortga-

gees are to take possession or sell, subject to the payment of this rent to Billings. It is a restriction on the amount of the estate of the mortgagees, and seems within the cases as to the power of sale in a mortgagee which, as incidental to his estate, is held not to be within the rule as to perpetuities. There may be considerable doubt also on the point raised by counsel, whether the rule as to perpetuities applies to a case like the present, where the party who or whose heirs are to take, is ascertained, and who can dispose of, release, or alienate the estate either at common law, or at all events, since the passing of the 8 & 9 Vict. *c.* 106, § 6."

The section of the Act referred to is that which enables a contingent executory and a future right and a possibility coupled with an interest in any hereditaments, whether the object be ascertained or not, to be disposed of by deed. Before that Act such interest could be released when the person contingently entitled was ascertained.

Lord St. Leonards, in the 8th edition of his treatise on Powers, at page 16, thus comments on that decision. He cites the language of Baron Martin thus: "A rent in fee simple, the court said, may be granted to a man and his heirs to continue forever. Why therefore may not one be granted to commence at any time however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person, and his heirs in fee simple, who may deal with it at his or their pleasure, it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time, however distant. This," said Lord St. Leonards, "is an important distinction in the law of perpetuity, but it was not necessary for the decision of the case. No perpetuity was created by the power of sale in the mortgagees or by the right of them or their heirs to take possession of the land, but in exercising that right they took, subject to a perpetual rent of £40 a year in favor of the mortgagor. It was a charge on the estate and had no tendency to a perpetuity."

From this it seems to me that Lord St. Leonards did not agree with the reason for the decision, but thought it could be supported upon the ground that the exercise of the powers of sale and entry by a mortgagee not being obnoxious to the rule against perpetuities, neither could a condition appended to the exercise of these powers be so.

The *dictum* at the end of the judgment in the Exchequer Chamber he does not seem to notice.

The other case cited to me is *Birmingham Canal Company* v. *Cartwright*, 11 Ch. D. 421. There a right of pre-emption, unlimited in point of time, was contracted to be given. The learned judge in that case cited the passages from the judgments in *Gilbertson* v. *Richards*, 4 H. & N. 277, which I have referred to, and stated his own opinion thus: "The next question arises upon the terms of the covenant giving

the right of pre-emption — whether or not that right is obnoxious to the rule against perpetuities. In my opinion the covenant is not in any way liable to that objection. I think that wherever a right or interest is presently vested in A. and his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the rule against perpetuities, such right or interest is not obnoxious to that rule, and for this reason. The rule is aimed at preventing the suspension of the power of dealing with property — the alienation of land or other property. But, when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and they can together at any time alienate the land absolutely. I think that *Gilbertson* v. *Richards* is a distinct authority in favor of that conclusion."

I need not say that after quoting such authorities I should distrust my own judgment where it differs from them if I did not find ample authority to support me. But I am unable to agree with these *dicta*. In my opinion a present right to an interest in property which may arise at a period beyond the legal limit is void notwithstanding that the person entitled to it may release it.

It would be a great extension of the power of tying up property to hold otherwise. If the owner in fee of an estate, or the absolute owner of any property could be fettered from disposing of it by a springing use or executory devise or future contingent interest which might not arise till after the period allowed by the rule, it would be easy to tie up property for a very long time indeed. The present interest under the executory limitations might be vested in an infant, a lunatic, or in a person who would refuse to release it, and thus the estate would be practically inalienable for a period long beyond the prescribed limit. That is clearly not the law. From the report of *Gilbertson* v. *Richards* the *dictum* there, which I have read, seems to be founded upon a short extract from Sanders on Uses, thus cited in the report of the argument. In *Washborn* v. *Downs*, 1 Cas. C. 213, cited in Sanders on Uses, it is said "a perpetuity is where, if all that have interest join, and yet they cannot bar or pass the estate." The whole passage in Sanders is this: "It is said in the case of *Washborn* v. *Downs* that a perpetuity is where, if all that have interest join, yet they cannot bar or pass the estate, and in the case of *Scattergood* v. *Edge*, 1 Salk. 229, that every executory devise is a perpetuity so far as it goes, *i. e.*, an estate inalienable, though all mankind join in the conveyance. But," says Sanders, "these definitions of a perpetuity are not accurate. If an estate be limited to the use of A. and his heirs, but if B. should die without heirs of his body, then to the use of C. and his heirs, the limitation to C. and his heirs would be void as tending to a perpetuity.

Yet C. might no doubt release or pass his future estate, and with the concurrence of the necessary parties the fee simple might be disposed of before there was a failure of issue to B. A perpetuity may with greater propriety be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity."

This was written before the passing of the Act 8 & 9 Vict. *c.* 106, which only gives the power to alienate certain contingent interests then inalienable. But many cases besides that given by Sanders might be put in which a contingent interest which might be alienated or released before that Act would nevertheless be void if so limited that it might not arise within a life or lives in being and twenty-one years afterwards. It is impossible to assert as a general proposition that where the owner of an estate and the owner of such a contingent interest can together make a good title, or one can release to the other, the rule of perpetuities does not apply.

But it is very singular that the case of *Washborn* v. *Downs*, which seems to be the foundation of these *dicta*, hardly seems to justify the short report of it given by Sanders. In that case an equitable tenant in tail sought to suffer a recovery, and it seems to have been argued that unless he could do so there would be a perpetuity. The answer appears to have been No, because with the concurrence of the trustee, the owner of the legal estate, he could do so. The passage quoted refers to some such argument as this. The words of the report are these: "The court in the principal case took time to advise, and advised the parties to agree. And in the debate of this case it was said that a perpetuity is where if all that have interest join and yet cannot bar or pass the estate. But if by the concurrence of all having the estate tail it may be barred, it is no perpetuity." This does not mean that if a person presently entitled to the benefit of a springing use or executory devise void for perpetuity can release it, the power of doing so would prevent its being void. The question whether a *cestui que trust* could suffer a valid recovery was much discussed in the reign of Charles II., as appears by the cases of *Goodrick* v. *Brown*, 1 Cas. C. 49; *Lord Digby* v. *Langworth*, 1 Cas. C. 68; and it was afterwards held in *North* v. *Champernoon*, 2 Cas. C. 78, by Lord Nottingham, C., that the recovery of the *cestuis que trust* in tail was good, and the trustee would be compelled to convey accordingly. But if I am right in this view thus far, it does not by any means follow that the contract in this case is void.

The rule against perpetuities is a branch not of the law of contract but of property. This is clearly enough stated in page 5 of the Introduction to Mr. Lewis's well-known work on Perpetuities, in passages cited from Butler's notes to Fearne on Contingent Remainders and from

Jarman on Wills. Mr. Lewis, at page 164, adopts the definition of a perpetuity which I have read from Sanders, and adds one of his own, which runs thus: "In other words, a perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."

A contract not creating any estate or interest properly so called in property, at law or equity, is not, in my opinion, obnoxious to the rule. For instance, a covenant to pay £1000 when demanded, with interest meanwhile, if not barred by the Statute of Limitations, might be enforced by an action of covenant at any time. A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign, unless he takes with notice. They are not, properly speaking, estates or interests in land, and are therefore not within the rule. I think that this is the true test to apply to this case, and am of opinion that this covenant does not create any interest in land. A purchaser without notice from Powell would not be bound by it. It is not, I think, within the rule against perpetuities at all. Consequently I hold that objection to fail; and as the defendant took the land with notice, I hold that he is bound in equity by the covenant, on the principle of *Tulk* v. *Moxhay*, 2 Ph. 774.

I therefore make the usual decree for specific performance, with costs. I suppose the title is accepted, if not, there must be the usual reference as to title.

The defendant appealed. The appeal was heard on the 6th of March, 1882.

Davey, Q. C., *Whitehorne*, Q. C., and *Vaughan Hawkins*, for the appellant.

Rigby, Q. C., and *Gaselee*, contra.

Jessel, M. R. This is an appeal from a decision of *Mr. Justice Kay*, and it raises two points: first, whether an option of repurchase given to the London and South-Western Railway Company by a deed of sale entered into between the company and one Powell, the predecessor in title of the defendant Gomm, is obnoxious to the rule against remoteness; and secondly, whether the deed itself is or is not void, having regard to the 127th section of the Lands Clauses Consolidation Act, 1845.

The deed was made in 1865 after the compulsory powers of the railway company had expired, and it recited that the company was seised of the land which was no longer required for the purposes of their rail-

way and had contracted to sell it to Powell, who was the adjoining owner, at the sum of £100, subject to the condition thereinafter contained. The company then conveyed the land to Powell in fee for £100, and the deed contained this covenant by Powell: — [His Lordship read the covenant giving the option of repurchase to the company.]

Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words "within a reasonable time," or any other words limiting the time, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time, but it is obviously intended so to be. The railway company do not want the land now, and they do not know that they ever will want it, but their bargain is that whenever it may be required for the works of the company the owners or owner for the time being of the land are or is to convey to the company. The very essence of the contract is that it shall be indefinite in point of time. You cannot, as in *Kemp* v. *South-Eastern Railway Company*, Law Rep. 7 Ch. 364, insert by intendment the limitation that the land is to be taken before the time for executing the works had expired, for in this case the time for the execution of the works had already expired. It appears to me therefore plain (and indeed it was admitted in argument by the respondents) that the option is unlimited in point of time.

If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this, as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognized exceptions, such as charities), between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period.

It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference. The question is, What is the nature of the interest intended to be created? I do not know that I can do better than read the two passages cited in argument from Mr. Lewis's well-known book on Perpetuities at page 164. He cites with approbation this passage from Mr. Sanders' Essay on Uses and Trusts: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity." Then Mr. Lewis adds these words: "In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."

Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to A. in fee, with a proviso that whenever a notice in writing is sent and £100 paid by B. or his heirs to A. or his heirs, the estate shall vest in B. and his heirs, and a contract that whenever such notice is given and such payment made by B. or his heirs to A. or his heirs, A. shall convey to B. and his heirs? It seems to me that in a court of equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other.

That appears to me to dispose of the case, unless we agree with the conclusion of Mr. Justice Kay on the last point considered by him. Down to that point I agree with him. I consider that he is quite right in the view he takes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of the *Birmingham Canal Company* v. *Cartwright*, 11 Ch. D. 421, which must be treated as overruled. But Mr. Justice Kay, having, as I think he has, most correctly and accurately defined the law, thinks that this case is not within it, because he comes to the conclusion that "this covenant does not create any interest in the land." But he had forgotten that if that were so he could not make a decree against Mr. Gomm. If it were a mere contract it was not Gomm's contract, and if it did not in equity run with the land so as to give an interest in the land, it could not have been enforced against him. It is clear from his Lordship's judgment that if

he had been of opinion that this covenant gave the company an interest in the land (which, I think, is the correct view), he would have decided the case the other way.

With regard to the argument founded on *Tulk* v. *Moxhay*, 2 Ph. 774, that case was very much considered by the Court of Appeal at Westminster in *Haywood* v. *The Brunswick Permanent Benefit Building Society*, 8 Q. B. D. 403, and the court there decided that they would not extend the doctrine of *Tulk* v. *Moxhay* to affirmative covenants, compelling a man to lay out money or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. Of course that authority would be binding upon us if we did not agree to it, but I most cordially accede to it. I think that we ought not to extend the doctrine of *Tulk* v. *Moxhay* in the way suggested here. The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case*, 5 Co. Rep. 16*a*, to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* was affirmative in its terms, but was held by the court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not. It appears to me that, rightly considered, that doctrine is not an authority for the proposition that an equitable estate or interest may be raised at any time, notwithstanding the rule against remoteness. It is, if I may say so, another exception to the rules against remoteness, exceptions which had previously been thoroughly established in many cases at law as regards easements, and in equity as regards charities. That being so, it does not appear to me that *Tulk* v. *Moxhay* has any direct bearing on the case which we have to decide.

There is another important point which alone would enable us to decide this case in favor of the appellant. Was the conveyance of 1865 *ultra vires?* When we look at the provisions of the Lands Clauses Consolidation Act, § 127 *et seq.*, I think we must consider them to mean that at the expiration of the statutory period, if the

land is then superfluous, that is, if it is not wanted for the purpose of the railway, the company must sell it under the penalty of losing it by its revesting in the adjoining owner. There is no doubt that the company can, before the expiration of the statutory period, determine that the land is superfluous and sell it, and it is equally clear that if at the end of the statutory period they think that the land may be required for the purpose of their railway it is not then superfluous. When I say "they think," I mean if their proper advisers have fairly and reasonably come to that conclusion, that is sufficient. So that the fact of its being superfluous may be determined beforehand by the action of the company, or it may be delayed after the expiration of the statutory period without the land being actually used, but whenever it is determined, either before or after the expiration of that period, that the land is superfluous, it becomes salable or vests in the adjoining owner.

That being so, it is plain that when land is sold as superfluous, no interest in it can be retained by the company. Now, if I am right in the conclusion at which I have arrived as to the nature of this option of repurchase an interest was retained by the company. The form of the conveyance is plain. It recites a contract for sale subject to the condition thereinafter mentioned. That is not an absolute sale but a conditional sale. Now the Statute in terms requires an absolute sale, and that being so, the company could not sell, reserving an option of repurchase. The sale itself therefore was beyond their power, and was a void sale, and we must recollect that this is a Statute which governs the legal estate as much as the equitable estate. Then what follows? The land if superfluous revested in Mr. Powell under sect. 127 at the end of the ten years, free from any restriction, which would give him a title; but if it was not superfluous, then as the statutory period of limitation had elapsed before the commencement of this action, the appellant would have obtained a title under the Statute of Limitations. In either case, therefore, the appellant's title must be valid as against the title of the company.

On these grounds it seems to me that the present appeal ought to be allowed.

Sir James Hannen. The first question in this case is as to the effect of the deed of the 10th of August, 1865.

It appears to me that the company are estopped from denying that this land was superfluous land at the time of the sale to Powell. It is expressly recited that the land is no longer required, and that they thereupon propose to sell it at a particular price.

It is perfectly plain that the company has only the right to sell subject to the terms imposed by the legislature in the Lands Clauses Consolidation Act. That Act requires the company to sell absolutely, and looking to the history of legislation on this subject I think there is no doubt that particular stress was laid upon the word "absolutely." It was inserted, in my opinion, in order to prevent the company having acquired lands which it was found afterwards were not required for the

purpose of the undertaking, from still retaining indirectly a hold upon those lands. It appears to me, therefore, that as this was not an absolute sale, but a conditional sale, it was void, and that the effect would be that at the end of the ten years, there being no sale, the land would vest in Powell. At the same time I do not think that every contract made by a railway company for the purpose of settling at the present time what should be the price of land to be acquired by them at some future time would be bad in itself. I think that if there had been a separate contract limited to the time within which the company would have authority to take lands, there would not have been anything illegal in their entering into an arrangement with the owner that they should have a right to purchase at a particular price to save the trouble and inconvenience of having the value settled in some other manner, and *Kemp* v. *South-Eastern Railway Company*, Law Rep. 7 Ch. 364, is an authority to that effect.

The next question is, does this covenant create an interest or estate in the property at law, or in equity. Upon that point I have nothing to add to what has been said by the Master of the Rolls. It is not a subject with which I have been frequently called upon to deal, and therefore, any opinion that I may express on the subject has not the value it would have if it came from one of my learned colleagues; but I must say that it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land. If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from Sanders, "a perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined." Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option.

The last question is, supposing this covenant does not create any estate or interest, what is the effect of it as a covenant? It is clear that it is not a covenant which would run with the land at law. *Spencer's Case* and the notes to it in Smith's Leading Cases, vol. i. 8th ed. p. 90, seem to me to point very clearly to that conclusion. It has been said, however, and in fact the judgment with which we are dealing lays down, that although this is only a personal covenant, yet *Tulk* v. *Moxhay* is an authority for the proposition that such a covenant if known to the purchaser of the estate binds him. This argument is disposed of by the decision of the Court of Appeal in *Haywood* v. *The Brunswick Permanent Benefit Building Society*, which seems to me to put a wholesome restriction upon the application of *Tulk* v. *Moxhay* by laying down this rule, that it only applies to restrictive covenants, and does not apply to an affirmative covenant, such as a covenant binding the owner of the land at some future time to convey it.

For these reasons I am of opinion that the judgment of the court below cannot be supported, and that the appeal must be allowed.

LINDLEY, L. J. I am of the same opinion. This is an action for specific performance of a contract entered into not by the defendant but by somebody else. The first thing, therefore, the plaintiffs must show is, upon what legal principle the defendant is bound by a contract into which he did not enter.

It is not contended that he is bound by it on the ground that the covenant entered into by Powell runs with the land and binds him at law, but it is said that though it does not bind him at law it binds him in equity.

Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in *Haywood* v. *Brunswick Permanent Benefit Building Society*, and because it was sought there to extend the doctrine of *Tulk* v. *Moxhay* to a degree which was thought dangerous, considerable pains were taken by the court to point out the limits of that doctrine. In that case an owner in fee had granted a rent, and in order better to secure it, he covenanted for himself, his heirs and assigns, to build some houses on the land out of which the rent issued and to keep them in repair forever. It was sought to enforce that covenant by bringing an action for damages against the mortgagee in possession of the land, because the houses had been allowed to get out of repair. It was of course seen that an action would not lie at law; but it was contended, on the authority of *Tulk* v. *Moxhay*, that inasmuch as the defendants took the land with notice of the covenants they were bound by them in equity. The Court of Appeal declined so to extend the doctrine of *Tulk* v. *Moxhay*, and their reasons will be found very carefully stated by Lord Justice Cotton in his judgment. The conclusion arrived at by the court was that *Tulk* v. *Moxhay*, when properly understood, did not apply to any but restrictive covenants. The case of *Cooke* v. *Chilcott*, 3 Ch. D. 694, before Vice-Chancellor Malins was very much considered, but it was not followed by the Court of Appeal. Here we are asked to extend the doctrine of *Tulk* v. *Moxhay*, and to apply it to a covenant to sell land at any time for a specified sum of money. That this is an extension of the doctrine cannot, I think, be denied; and for the reasons which were given by the Court of Appeal in the case to which I have referred I think we ought to decline to extend that doctrine. If so, how is Gomm to be held to be bound by this covenant? He did not enter into it, he is not bound at law, and *Tulk* v. *Moxhay* is no authority for saying that he is bound in equity. That appears to me to dispose of this case.

I agree with the observations made by the other members of the court, that this covenant creates an interest in land and is void for

remoteness. On the question of remoteness one view was taken by Mr. Justice Kay in this case, and the other view by Mr. Justice Fry in *Birmingham Canal Company* v. *Cartwright*. My own view is that the observations made by Mr. Justice Kay on that case and on *Gilbertson* v. *Richards*, are sound. The error in his judgment appears to me to be, that he has applied *Tulk* v. *Moxhay* to this case without sufficiently considering the extent to which he was carrying it.

As regards the observations upon sect. 127 of the Lands Clauses Consolidation Act, I also concur with the other members of the court. It appears to me that inasmuch as the company could only sell by virtue of that section, which requires an absolute sale, and as the sale which they made was not an absolute sale within the true meaning of that clause, the logical consequence is that the whole transaction is void, and on this ground, if there had been no other, the court must have declined specifically to perform the contract.

I am therefore of opinion that the appeal must be allowed, and judgment must be for the defendant.

Mr. Davey asked that the costs of the short-hand notes of Mr. Justice Kay's judgment might be allowed.

Jessel, M. R. We have not used them, but have read Mr. Justice Kay's judgment in the Law Journal. If that report had appeared a sufficient length of time before your brief was delivered, we should not have allowed the costs of a short-hand note; but as it was published so late as the 3d of March, we think the costs ought to be allowed.

DUNN *v.* FLOOD.

Chancery Division. 1883.

[*Reported* 25 *Ch. D.* 629.]

James Noble, by his will, devised all his real estate to trustees, B. Dunn and James Wicks, upon trust after the decease of his wife (which happened in his lifetime), at the discretion of the trustees, to sell the same and to invest the moneys produced by the sale as in the will mentioned.

James Noble died in August, 1882, and in November, 1882, the trustees caused his real estate to be put up for sale by auction in thirty-three lots. As to lots 2 to 33, which were parts of a piece of land at Reading, the 4th condition was that the vendors would deliver an abstract of title commencing with an indenture of conveyance from J. H. Johnson to "James Noble, dated the 2d day of October, 1872; and every recital or statement in any abstracted document shall be deemed conclusive evidence of the fact or matter recited or stated or therein to be assumed or implied therefrom." The 6th condition stated that the respective lots were sold subject to the existing tenancies, restrictive

covenants, and other incidents of tenure (if any), and that the respective purchasers were to covenant accordingly. There were also what were called "general conditions," that the purchasers should covenant to observe certain building lines and erect certain fences, and not to carry on the trade or business of a hotel-keeper or other trades, following the words of the covenant in the deed of the 1st of June, 1872, hereafter set out. According to the evidence for the defendant, it was stated by the auctioneer that the restrictive covenants were included in the general conditions.

C. J. Flood at the auction bid for and was declared the purchaser of several lots at the price of £702 10*s.*, on which he paid a deposit.

Flood objected to complete, and alleged, what was not disputed, that the title was as follows: John Harris, who died in 1823, devised this piece of land (subject to several life annuities which had come to an end) to his wife for her life, and after her death to trustees upon trust for sale. She died in 1871, and on the 22d of April, 1872, the piece of land was sold and conveyed by the trustees to H. A. Simonds, H. J. Simonds, and B. Simonds, brewers of Reading. By an indenture, dated the 1st of June, 1872, Messrs. Simonds conveyed the piece of land to J. H. Johnson, who thereby covenanted that he, his heirs and assigns, would not carry on, or permit to be carried on, upon the premises, the trade of brewer, hotel-keeper, innkeeper, victualler, vintner, or dealer in wines, spirits, or beer. And that in case any breach of that covenant should be committed it should be lawful for the vendors to enter upon the premises, or any part thereof whereon such breach should have been committed, and to occupy and possess the same for their own benefit, until the trade or business so carried on should be discontinued, and also for the space of three calendar months from the time of such discontinuance: provided always, that this covenant should not extend to charge any messuage or premises other than the particular messuage or premises on which such breach of covenant should have been committed. On the 2d of October, 1872, J. H. Johnson conveyed the piece of land to James Noble, the testator of the vendors. In each of the conveyances were covenants for the production of the earlier deeds, those deeds not being delivered to the purchaser.

The purchaser's objections were, 1, that the vendors being trustees for sale ought not by the conditions to have limited the title to the conveyance of the 2d of October, 1872; 2, that the condition of re-entry in the deed of the 1st of June, 1872, was not referred to in the conditions, and was a defect in the title; 3, that the extent of the restrictions did not sufficiently appear on the conditions.

The vendors thereupon brought this action, claiming specific performance.

Everitt, Q. C., and *MacSwinney*, for the plaintiffs.

W. W. Karslake, Q. C., and *W. H. King*, for the defendant.

North, J. The first point I am going to dispose of is that with respect to the power of re-entry, which arises under these circumstances.

In a deed made on the 1st of June, 1872, which was antecedent to the date fixed for the commencement of the title, there is a covenant not to carry on certain trades, and a power, in case any breach or breaches of that covenant shall be committed, for the vendors to enter upon the premises and to hold, occupy, possess, and enjoy the same, and the rents thereof, and receive and take for their own use and benefit until the trade or business so improperly carried on shall be discontinued, and also for a further space of three calendar months from the time of such discontinuance: then further on in the deed there is a proviso that that clause is to be read *reddendo singula singulis*, it is only to be exercised as regards that particular portion of the premises upon which any breach might happen to take place. It is to be observed that the power to re-enter, hold, possess, and enjoy, is one which, according to its language, may come into operation at any time whatever, so that there is no limit of time fixed during which it is to apply — no limit to prevent its being a claim in perpetuity. The question is whether that is a power to which any effect can be given. I have been told that it is a nice point which will be raised, and will most probably be a matter of contest. But it does not appear to me to be a point admitting of any doubt. It seems to be completely settled by authority. It is sufficient for this purpose to refer to what is laid down by the Court of Appeal, and more particularly by the late Master of the Rolls, in the case of *London and South Western Railway Company* v. *Gomm*, 20 Ch. D. 581. The Master of the Rolls says, "I do not know that I can do better than read the two passages cited in argument from Mr. Lewis's well-known book on Perpetuities (page 164). He cites with approbation this passage from Mr. Sanders's Essay on Uses and Trusts: 'A perpetuity may be defined to be a future limitation, restraining the owner of the estate from alienating the fee-simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.' Then Mr. Lewis adds these words: 'In other words a perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation.'" That definition was adopted by the court and applied to the state of circumstances then before the court, and it seems to me entirely to govern the case now before me, because the interest to arise under this power of re-entry is executory, and will not "vest until after the expiration of, or necessarily within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation." It seems

to me that this comes precisely within that definition, and therefore it is too remote, to use the common phrase, and cannot be put into force. Mr. Karslake says that no case has gone the length of deciding that this applies to the state of things arising with respect to the interest, so to call it (in an indirect sense), which a person has under a negative covenant not to deal with the property in a certain way. To make such a case an exception to the general rule I should want an authority. It is not sufficient to say that the general law has not been applied to that particular case; if an exception is to be made to the general law, I must have some ground for making it. No such authority has been produced, and in principle I see no reason whatever why there should be such an exception from the general law. On that ground I think that the time has arrived when I can properly express an opinion that this power is not binding, and that I cannot act on the footing of its existence. I must say further that, independently of that consideration, I should have been very reluctant to refuse specific performance on that ground when it was clear that the person who took the estate could not be injured by the exercise of the power unless through a breach of covenant on the part of that particular person. If it had been necessary to decide the case upon that point, I should have decided that this was not an objection to specific performance.

But there is the other part of the case, which relates to the objection that the trustees have not exercised their power in the way in which they ought to exercise such a power. Now, taking the definition given by Lord Justice James in *Dance* v. *Goldingham*, Law Rep. 8 Ch. 902, the question for me to consider is whether the case comes under the law as laid down by him there. He says (Law Rep. 8 Ch. 909): "I have always understood it to be the law, consistently with authority and principle, that, however large may be the power of trustees under their trust deed to introduce conditions limiting the title, and other special conditions, which have, or are calculated to have, a depreciatory effect on the sale, they are bound to exercise them in a reasonable and proper manner — that they must not rashly or improvidently introduce a depreciatory condition for which there is no necessity." In the present case no one suggests that the trustees or their solicitors have done anything that was not in good faith, and what they really considered might be a saving of expense to the estate. But the question is, whether I can say that the purchaser would be free from any possibility of objection on the part of the *cestuis que trust* of this property, by reason of the trustees having exercised their power in the way in which it was exercised by them.

There are three things which seem to me to show that these conditions are not right. What I might have said with respect to any one of them if alone, I need not discuss, but looking at the three together, I certainly think that the conditions are not such as that the contract ought fairly to be forced upon a purchaser. The three things are: first, the date of the commencement of the title; secondly, the want of

harmony between the 6th condition and the general conditions as to the restrictive covenants; and thirdly, the condition making recitals evidence. Now if the second had been the only point, viz., that the restrictive covenants mentioned in the general conditions are not identified — are not shown to be co-extensive with the restrictive covenants mentioned in the 4th condition, I think I could have got over it; but still it is a circumstance which deserves notice. Looking at all three together, I must say that I do not think the trustees have done what they ought to have done in selling this estate. It is said that they have framed the conditions in this way to save expense. I daresay they have done so, but it would have saved still more expense if they had stipulated that there should be no title whatever. No one, however, would suggest that that would be a condition which the trustees would under the circumstances have been justified in imposing upon intending purchasers.

Looking then, first, at the question of title. I do not see any sufficient reason for limiting the abstract to the conveyance to the testator of the vendors. There is nothing whatever to show that there was any difficulty in getting at the earlier deeds, and though no doubt the two immediately preceding deeds may only carry the title back six months or so, yet I do not think it would be an immaterial matter in selling property of this kind if it was known and stated in the conditions of sale that the title would commence with a purchase and a subsequent sale by persons so well known in Reading as Messrs. Simonds the brewers, and also that there had been three different transfers of the property within the ten years to which the title was limited, all for valuable consideration. It seems to me, therefore, that the reason given for not going further back is not a sufficient reason. Whether it might have been desirable under the circumstances to go back to Harris's will is a different matter. I can easily believe that the title might have commenced with the conveyance from Messrs. Simonds, accompanied by such explanations as would justify the trustees in not going further back. They might have taken another course, and have gone back to Harris's will, and though there might have been some special provisions as to the deaths of the annuitants, I do not think that they would have caused much trouble. Either of those courses was open to them, but I do not think that what they have done was in accordance with their duty to the testator's estate.

Then there is the question as to the restrictive covenants, which, as I have said, is a circumstance to be looked at, though it might not of itself be sufficient. And thirdly, there is the condition that every recital shall be conclusive evidence, which I cannot think justifiable. In the present case I do not find anything to justify that condition. It is not necessary for me to say that no trustee could, under any circumstances, properly introduce such a condition, but the circumstances, in order to justify it, must be very special, and I find no such circumstances here. The Vendor and Purchaser Act, 1874, only refers to recitals in docu-

ments twenty years old; it does not make even those conclusive evidence.

On the whole, I think that this sale cannot be enforced by an action for specific performance; and the claim must be dismissed, with costs.

See also [illegible] 1889, 1 Ch. 560

IN RE FROST.

CHANCERY DIVISION. 1889.

[*Reported* 43 *Ch. D.* 246.]

ADJOURNED SUMMONS. Thomas Frost, by his will dated the 19th of March, 1870, made the following devise: —

"I give to my sons, John Frost, Edwin Frost, and Albert Frost, all those my closes of land and hereditaments situate in the parish of South Brent aforesaid which are described in the 7th schedule of this my will, to hold the same unto and to the use of my said sons, John Frost, Edwin Frost, and Albert Frost, and their heirs, during the life of my daughter, Emma Frost, without impeachment of waste, upon trust, so long as she shall continue unmarried, to permit her to receive the rents and profits thereof to her own use, but in case she shall hereafter marry, then upon trust to receive the rents and profits thereof, and pay the same to my said daughter, Emma Frost, for her separate use, free from the debts, control, or engagements of any husband whom she may hereafter marry, and her receipt alone to be a good discharge for the same. And after the decease of my said daughter, Emma Frost, then to the use of any husband whom she may hereafter marry, and his assigns, during his life, without impeachment of waste; and from and after the decease of the survivor of them the said Emma Frost and of such husband, to the use of all and every or such one or more of the children of my said daughter, Emma Frost, for such estate or interest and subject to such charges, and in such manner, without prejudice to the executory devise over hereinafter contained, as my said daughter, Emma Frost, shall by deed or will, notwithstanding coverture, appoint; and in default of appointment, and so far as no such appointment shall extend, to the use of all and every the children or child of my said daughter, Emma Frost, who shall be living at the time of the death of the survivor of them, the said Emma Frost and such husband of the said Emma Frost, or shall have previously died leaving issue then living, their, his or her heirs and assigns, if more than one in equal shares as tenants in common; but in case no child of the said Emma Frost shall be living at the death of the survivor of them, the said Emma Frost and such husband, or shall have previously died leaving issue then living, then to the use of such of my sons and of my other daughters as shall be then living, or shall have previously died

leaving issue then living, their, his or her heirs and assigns, if more than one in equal shares as tenants in common."

And the testator gave to his said sons, John Frost, Edwin Frost, and Albert Frost, their heirs, executors, administrators and assigns, all his residuary real and personal estate and effects, upon trust to sell the same and divide the proceeds, after payment thereout of his debts, funeral and testamentary expenses, equally between his eight children, naming them, including the said Emma Frost.

The testator died on the 23d of April, 1870, leaving all his eight children, including Emma Frost, surviving him. At her father's death, Emma Frost was a spinster, but in 1872 she married Robert Tyley. Shortly afterwards, in the same year, she died, but without issue. Robert Tyley died on the 20th of October, 1888.

This summons was taken out to ascertain whether, according to the true construction of the will, the South Brent estate, upon the death of Robert Tyley, passed under the residuary gift; the question for argument being whether the limitations over after the death of Robert Tyley were or were not void for remoteness.

Badcock, for the plaintiff, a person claiming under the residuary gift.

Rowden, for defendants in the same interest.

W. J. Lee, for defendants claiming under the gift over.

KAY, J. I believe it would not be at all advantageous to reserve my judgment in this case, because, as far as I know, the amount of authority is not very extensive, and I have no doubt that counsel have called my attention to the most important cases.

The limitation under this will is in this form: [His Lordship read the first part of the limitations of the South Brent estate, and continued:] Now the estate to trustees was specially limited to them and their heirs only during the life of Emma Frost; so that the limitation "to the use of any husband whom she may hereafter marry" is a legal limitation to such husband, and the limitations which follow are also legal limitations. [His Lordship read the limitations, and proceeded:] The question is, whether the limitation in favor of the children of Emma Frost, with the gift over in default to other persons, is good. It is very clear that if it were a limitation of personal estate, or by way of executory devise, it would offend against the rule of perpetuity, because Emma Frost was unmarried at the date of this will. She might have married after the death of the testator a person who was not born in his lifetime, and it might therefore have been a limitation to Emma Frost for life, remainder to an unborn person for his life, with a contingent remainder over to the children of Emma Frost living at the death of that unborn person, or such of them as should be then dead leaving issue then living, and an alternative limitation to other persons, still to be living at the death of that unborn person, or leaving issue then living. That clearly would be a limitation which would offend against the rule of perpetuity, because it would tie up the estate, not merely during the life of Emma Frost, who was in existence at the death of the testator,

but during the life of Emma Frost's husband, who might possibly not be living at the death of the testator. So that it would not merely be tied up for a life in being, and twenty-one years after, but for a life in being, with remainder for a life not in being, with a contingent gift over. But it is said "this is not an executory devise, but simply a legal limitation by way of contingent remainder, and therefore the rule as to perpetuities does not apply to the case at all." Let it be so. No doubt contingent remainders were invented long before the rule of perpetuity, and they were not originally subject to any such rule. But they were subject, before this rule was invented, to another rule which was thus expressed in the old legal language, that you cannot limit a possibility upon a possibility; and the familiar illustration is that you cannot limit by way of legal devise or conveyance to A., an existing person, for life, with remainder to his unborn son for life, with remainder to the children of that unborn son. That last remainder was void, because, according to the phrase used in the old law, it was "a possibility upon a possibility." Now I think, there is no question that this is the law to this day, although the reason for it has been contested by modern lawyers, and a learned argument on the point may be found in that very valuable book, the late Mr. Williams's Treatise on the Law of Real Property. I lately had to consider the point myself in *Whitby* v. *Mitchell*, 42 Ch. D. 494, and I decided that the rule exists to this day. I find in Butler's note to Fearne on Contingent Remainders (10th ed., 1844, p. 565) this statement. After dealing with the doctrine of perpetuities or excessive restraint upon alienation, he says: "No question of perpetuity could arise at the Common Law, or under the Statute *De Donis*. It has been shown, that after the Statute *De Donis*, and before the introduction of executory uses, future estates could only be created by way of remainder. The remoteness of a remainder, however great, was no objection to it, on its creation. If the event, upon which it was to vest, took place during the continuance of the preceding estate, or at the instant of its determination, the remainder would vest in possession immediately on the determination of the preceding estate; if the event did not take place during the continuance of the preceding estate, or at the instant of its determination, the remainder would wholly fail of effect: during this period, therefore, of our law, all inquiry respecting perpetuity was out of question. The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited, so as to confer an estate by purchase on that person's issue."

There the rule is confined, no doubt, to that person's issue. I read the note because it recognizes that the rule exists, and has as much force in the present day as when it was originally invented. What was the reason of that rule? As expressed by the learned lawyers of that day, it was on the ground of a possibility upon a possibility. What does

that mean? It means that there might never be such a person as an unborn person who was to take for life. That was an obvious contingency. Besides there was another contingency. There might never be issue of that person. Therefore there was a double contingency, or a double possibility. I quite agree that the contingency in this case is not of that kind precisely. But is it not the same in effect? There is the double possibility. There might not be an unborn husband — I mean a husband of Emma Frost unborn at the death of the testator. But if there were, the other contingency which is to take effect upon his death might never happen. There you have a double contingency or a double possibility, as the old lawyers would have said. I confess I think that this limitation would have been held to fall within the same doctrine, and would most probably have been held void, if the ingenuity of lawyers had ever imagined such a limitation.

But if it is not void upon that ground it is certainly void as a perpetuity if the rule against perpetuity applies to the case. I have to ask myself the question whether the rule against perpetuity applies to the case or not — whether it is void on the ground of perpetuity. Lord St. Leonards in *Cole* v. *Sewell*, 4 D. & War. 28, used language which has been read as meaning that the doctrine of remoteness never could apply to a contingent remainder: and the same language, or something like it, is also used in what I have read from Butler's note. But in every one of these cases the language refers simply to the case of an estate for life or an estate tail limited to a person *in esse* when the limitation takes effect. If this is so it is quite clear that no contingent remainder to take effect upon the determination of that estate could be exposed to any objection on the ground of being too remote. But none of that language contemplates the case of there being interposed a possible estate for life to a person not in existence, and a contingent remainder over on the death of that person. However, I do not at all agree that under the law of the present day there cannot be any application of the rule against perpetuities to remainders. I find in Fearne on Contingent Remainders, in the edition already referred to (page 502) this statement of the law: "Here indeed it may not be improper to remark, once for all, that any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our courts considered as void in its creation." Here, then, is a clear statement of the law in a book of great authority, that the rule against remoteness will be applied to contingent remainders as well as to contingent limitations by way of executory devise. I take the meaning to be this: There are limitations which would have been void under the old law, because they would have been treated as possibilities upon possibilities. The like limitations would now be void, but perhaps for a different reason, namely, because they offend against what in more modern law we call the rule against perpetuities. I think, therefore, on the whole, that the balance of

authority is in favor of the view that this limitation, although a legal limitation, is void, because it offends against the rule of perpetuity. There will be a declaration accordingly, and that the lands in question fall into the residuary gift.

IN RE HARGREAVES.

COURT OF APPEAL. 1890.

[*Reported* 43 *Ch. Div.* 401.]

HANNAH HARGREAVES, by will dated the 24th of November, 1838, devised to John Townsend and Henry King certain specified freeholds, "To have and to hold the same unto and to the use of them, the said John Townsend and Henry King, and the survivor of them, and the heirs and assigns of such survivor upon the trusts, nevertheless, and to and for the several uses, ends, intents, and purposes thereinafter mentioned, expressed, and contained of and concerning the same." The trusts were to receive the rents and pay the residue, after deducting expenses, to her sister Mary for life, for her separate use, as therein mentioned, and after her decease "upon further trust to pay the residue of such rents to her oldest child during his or her life, and after the decease of such oldest child to the next oldest child during his or her life, and so on in succession to the next oldest child during his or her life, till all the children of my said sister Mary shall depart this life, and from and after the decease of my said sister Mary and all her children upon further trusts to pay the residue of such rents, issues, and profits" to the testatrix's sister Eliza for life for her separate use as therein mentioned, and after her decease to pay the residue to her children successively in the same way as to Mary's children. "And from and after the decease of my said sisters Mary and Eliza and all their children, upon further trusts that they, my said trustees, or the survivors of them, or the heirs or assigns of such survivor do and shall stand seised of the said freehold hereditaments and premises, in trust for such person or persons, in such parts, shares, and proportions, and in such manner and form, and under and subject to such powers, provisions, directions, limitations, and appointments as the longest liver of them, my said sisters Mary and Eliza and their children, shall, notwithstanding coverture, by any deed or deeds, instrument or instruments in writing, or by his or her last will and testament in writing, or any codicil or codicils thereto to be respectively duly executed and attested, direct, limit, or appoint, give, or devise the same, and in default of any such direction, limitation, or appointment, gift or devise then upon further trust of the same freehold hereditaments and premises for my own heir-at-law absolutely."

The testatrix died in December, 1838. Her sister Mary died in 1864,

leaving two children surviving her, one of whom died in 1871; the other, Hannah Tatley, lived till 1889, when she died, leaving a will, made in 1885, by which she appointed this property to a trustee in trust for her children. The testatrix's sister Eliza had died childless in 1873.

The persons on whom the legal estate vested in the trustees of the will of Hannah Hargreaves had devolved took out an originating summons to have it decided whether the trust limitations, to take effect after the deaths of the testatrix's sisters Mary and Eliza and all their children, were valid, and who in the events which had happened was entitled to the property. The defendants were the trustee under the will of Hannah Tatley and the person who claimed under the heir-at-law of the testatrix.

KAY, J., said that he should decline to hear an equitable ejectment upon an originating summons. The plaintiffs appealed.

Ryland, for the plaintiffs.

Upjohn, for the person claiming under the heir-at-law. The objection was not taken by me, but by Mr. Justice Kay, and I submit that the court had jurisdiction. The property being very small, I should be glad for the case to be disposed of here, without incurring further expense.

F. Thompson, for the appointee, concurred in this. The case then proceeded on the merits.

COTTON, L. J. This is a case where trustees of a will in whom the legal estate in fee is vested, and who are in possession of the property, come asking to have a decision, to whom, according to the true construction of the will, they ought to hand over the property. It would be construing Order LV., rule 3, too narrowly if we were to say that they cannot raise this question by originating summons. The question to whom the beneficial interest in the property now belongs turns upon the point whether the power of appointment given by the will of the testatrix is void for remoteness. The limitation to the sisters for life and to their children for their lives are perfectly good, but in my opinion the power to appoint is void for remoteness. This power is given to the last survivor of the sisters and their children. The children might not all be in being at the death of the testatrix; the power, therefore, is not given to a person who must necessarily be ascertained within the period allowed by the rule against perpetuities. On the death of the last surviving child the equitable estate devolved on the heir-at-law of the testatrix, not under the trusts declared by her will, but as on a partial intestacy, occasioned by the failure of the ulterior trust.

I must say a few words as to *Avern* v. *Lloyd*, Law Rep. 5 Eq. 383, which is very like the present case. The Vice-Chancellor there says that as there may be a limitation of valid life estates to the unborn children, why may there not be this ultimate limitation after their determination? No doubt there may, if it is limited to a person who is necessarily ascertainable within the prescribed period. It is very true

that after the decease of the tenants for life the children could have disposed of their interests, vested and contingent, so that (apart from the question of the validity of the limitations) the estate might have been disposed of as soon as the tenants for life were dead, and it may be contended that as the alienation of the estate is not prevented the case is not within the rule as to remoteness. But that is not the true way of looking at it. An executory limitation to take effect on the happening of an event which may not take place within a life in being and twenty-one years, is not made valid by the fact that the person in whose favor it is made can release it.

Lindley, L. J. I am of the same opinion. Mr. Justice Kay could not have decided the question of jurisdiction as he did if there had not been some misapprehension as to the nature of the case. A trustee has got the estate in his hands, and asks the court to tell him what he is to do with it. There may be complicated cases where a judge may say: "I cannot safely decide such a question as this in a summary way; you must proceed by action," but there is clear jurisdiction to decide such a question on summons.

As to the merits, the person who is to exercise this power is not necessarily ascertainable within the period allowed by the rule against perpetuities, and the power therefore is void. If *Avern* v. *Lloyd*, Law Rep. 5 Eq. 383, had been followed in other cases there would have been a difficulty, but that case had not been followed, and I do not think that it was rightly decided.

Lopes, L. J. I also am of opinion that this case comes within the words and the spirit of Order lv., rule 3, and that Mr. Justice Kay had jurisdiction to decide the question on originating summons. As regards the construction of the will, I am also of opinion that the ulterior limitations are void because the person to exercise the power would not necessarily be ascertained within a life in being and twenty-one years.

WHITBY *v.* MITCHELL.

Court of Appeal. 1890.

[*Reported* 44 *Ch. Div.* 85.]

By articles dated the 4th of November, 1821, made shortly before the marriage of Charles Dennis and Mary Elizabeth Maddy, it was agreed that upon the marriage a settlement should be made of certain lands to which Charles Dennis was entitled in fee simple.[1]

By a settlement made in pursuance of the articles, and dated the 7th of May, 1840, the lands were conveyed to the trustees and their heirs to the use of Charles Dennis for life, with a limitation to trustees to

[1] The statement of facts is taken mainly from the report of the case before Kay, J., 42 Ch. D. 494.

support contingent remainders, with remainder to the use of Mary Elizabeth Dennis for her life, with a like limitation to support contingent remainders, with remainder after the decease of the survivor of Charles and Mary Elizabeth Dennis, "to the use of a child, grandchild, or more remote issue, or all and every or any one or more of the children, grandchildren, or more remote issue of the said Charles Dennis by the said Mary Elizabeth his wife, such child, grandchildren, or more remote issue being born before any such appointment as hereinafter is mentioned shall be made to him, her, or them respectively, for such estate or estates, interest or interests, and in such parts, shares and proportions (if more than one), and with such limitations over, such limitations over being for the benefit of some or one of the objects of this present power, and in such manner and form, as the said Charles Dennis and Mary Elizabeth his wife" should by deed appoint, and in default of appointment, to the use of the child or children of Charles and Mary Elizabeth Dennis equally as tenants in common, and the heirs and assigns of the same child or children respectively, with a limitation over in case any of such children should die under twenty-one without leaving issue. The settlement contained the usual power of sale, and directions for investment of the proceeds in the purchase of land, and for interim investment thereof until a purchaser could be found.

Charles and Mary Elizabeth Dennis had only two children, viz., Emily Hyde Dennis (who afterwards married one Burlton) and another daughter. Both children were born before the date of the settlement of 1840.

By an indenture dated the 15th of March, 1865, Charles and Mary Elizabeth Dennis appointed that one moiety of the lands comprised in the indenture of the 7th of May, 1840, or the proceeds of sale thereof, should, after the decease of the survivor of them, go and remain to the use of Emily Hyde Burlton for life, for her sole and separate use, without power of anticipation, and after her decease, to the use of such person or persons as she should by will or codicil appoint, and in default of appointment to the use of the children of Emily Hyde Burlton living at the date of that indenture and their heirs equally as tenants in common, with a gift over in case all such children should die under twenty-one without leaving issue.

A similar appointment was also made by Mr. and Mrs. Dennis in favor of their other daughter, her children and appointees.

Kay, J., held that the appointment was invalid so far as it affected to restrain Emily Hyde Burlton from anticipation, and to give her a testamentary power of appointment, and to give the property in default of appointment to her children.

The three children of Emily Hyde Burlton appealed.

Marten, Q.C., and *W. Baker*, for the appellants.

Farwell, for Emily Hyde Burlton.

Cotton, L. J. This is an appeal from a decision of Mr. Justice Kay

declaring that certain limitations treated as introduced into an ante-nuptial settlement by virtue of a post-nuptial appointment under a power contained in the settlement, being limitations of legal estates, were void, not on the ground that they were void for remoteness, but that they were limitations which the law does not allow of legal estates. Now, what are these limitations? First, there is a limitation of a legal estate to an unborn child of the marriage for life, and then, after that, there is a limitation to the children of that unborn child. It is said that this latter limitation does not come within the rule against perpetuities, and that there is no other rule preventing this limitation from being good. Mr. Justice Kay has decided, and in my opinion rightly, that there is a rule in existence which does prevent the limitation from being good, namely, that you cannot have a possibility upon a possibility; or, to state the rule in a more convenient form, that you cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers. That is the same thing as what has been called "a possibility upon a possibility."

But it is said that, although there is such a rule in existence, that is superseded by the more modern rule against perpetuities. In my opinion the old rule with regard to a possibility on a possibility has not been done away with by this modern rule. It is conceded that the rule against a possibility upon a possibility existed long before the rule prohibiting the limitations of estates tending to a perpetuity existed. Can we say that the old rule has been put an end to or superseded? Mr. Joshua Williams lays it down that the rule still exists; while other text-writers say it does not exist. In this difference of opinion we must see what aid we can obtain from judges and others in high position. First of all, we have Butler's note to Fearne — and the same thing is expressed in the works of other writers — to the effect that the rule of law against double possibilities is a rule still existing, prohibiting limitations of estates in such a way as that, although they may not offend against the rule of perpetuities, they are bad as being objectionable to the law. Then Lord Kenyon, referring to that point in *Hay* v. *Earl of Coventry*, says (3 T. R. 86): "It is not necessary for me to say what effect that would have had in the present case, if that point" — that is, whether an estate for life could be given to unborn issue — "had remained undecided; because the law is now clearly settled that an estate for life may be limited to unborn issue, provided the devisor does not go farther and give an estate in succession to the children of such unborn issue." It is said that only meant that a limitation to the children of unborn issue generally, without any limit as to the time within which such children should be born, would offend against the rule of perpetuities; but in my opinion Lord Kenyon was referring to the old rule against double possibilities. It is clear, in my opinion, that the rule under which Mr. Justice Kay has decided this case is a rule which judges treated as still subsisting long after the rule against

perpetuities had been crystallized and laid down in definite and distinct terms.

Then, again, in *Monypenny* v. *Dering*, 2 D. M. & G. 145, Lord St. Leonards says (p. 170): "Then the rule of law forbids the raising of successive estates by purchase to unborn children, that is, to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon." According to the argument addressed to us on behalf of the appellants that old rule has been superseded by the modern rule against perpetuities; but here we have Lord St. Leonards treating it as still subsisting in 1852.

Then we have besides, Butler's note to Fearne (10th ed. vol. i. p. 565, *n.*), in which he lays down what he takes to be the law — that there was no decision superseding the old rule. He says this: "The cases of a possibility upon a possibility may be considered as exceptions from the rule. They proceeded on a different ground, and gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited so as to confer an estate by purchase on that person's issue." He there quite treats it as the true rule still subsisting. And then we have a statement by Burton, in his Compendium (7th ed. p. 255), showing that he did recognize clearly that the old rule was still subsisting. He says: "Life estates may by law be given in succession to any number of persons in existence, and ulterior estates in succession to their children yet unborn. . . . But no remainder can be given to the child of a person who is not in existence."

Therefore, although very ingenious and learned arguments have been addressed to us to show that the old rule has been superseded and put an end to, it is, in my opinion, well established that the rule is still in existence.

There is a passage in Lord St. Leonards' judgment in *Cole* v. *Sewell*, 4 D. & War. 1, 32, in which he speaks of the rule as being obsolete, but he nowhere lays down that the rule is no longer existing. He only means that the rule is no longer necessary to be referred to because, through the introduction of shifting uses and executory devises, the law is now governed rather by the rule against perpetuities. When Mr. Marten referred us to Sugden on Powers, I referred him to the opinion expressed by the learned author, when sitting as Lord Chancellor, in *Monypenny* v. *Dering*, 2 D. M. & G. 145, 170, in the passage which I have read, and which shows he did not consider the old rule to have been abrogated. In my opinion the decision of Mr. Justice Kay is right.

LINDLEY, L.J. I entertain no doubt myself that Mr. Joshua Williams' observations on this subject are correct from beginning to end, and I do not know that I could express my views better than he did. I do not know, any more than he seems to have done, the exact meaning of the old rule as to a possibility upon a possibility; and if any one turns to the passage in Coke upon Littleton where it is discussed, I hope he

will understand it better than I do. I confess I do not understand it now, and never did. But, at all events, it gave rise to the rule which everyone can understand, and which is expressed by Butler in the note to Fearne, where he says that "the cases of a possibility upon a possibility . . . gave rise to this important rule, that, if land is limited to an unborn person during his life, a remainder cannot be limited, so as to confer an estate by purchase on that person's issue." That is intelligible; and there are other passages on pages 502 and 503 showing this was the author's settled opinion.

I have always understood that to be the settled rule of law, and I am not aware of any decision or *dictum* which in any way impugns it. But it is said that the old rule became obsolete, or merged or confused in the more modern law of perpetuities. Butler, however, shows that this is a mistake. The rule against perpetuities was invented much later, on account of the law of shifting uses and executory devises. When shifting uses and executory devises were invented it became necessary to impose some limit upon them, and the doctrine of perpetuities has arisen from that necessity. The old rule against double possibilities is a rule that has not been abrogated, and it is founded on very good sense; because it is not desirable that land should be tied up to a greater extent than that allowed by the rule. So far from supporting ingenious devises for tying up land longer, the time has long gone by for that: and, as the law is against the appellant's contention, in my opinion the appeal should be dismissed.

Lopes, L. J. That there was an old rule that an estate could not be limited to an unborn child of an unborn person has been admitted, and, in fact, cannot be denied. It was an old rule originating out of the feudal system. But it is said that, although this old rule did once exist, it has been superseded by the rule against perpetuities. No direct authority has been cited for any such contention, nor can any such authority be found. Counsel have referred to certain *dicta* by text-writers of more or less doubtful import; but as early as the year 1789 that old rule was recognized as existing by Lord Kenyon in *Hay* v. *Earl of Coventry*, 3 T. R. 83; and again, in 1852, it was recognized, in *Monypenny* v. *Dering*, by so great an authority as Lord St. Leonards. Thus, in 1789 and 1852, that rule was recognized, — that is to say, at a time when the rule against perpetuities was in existence.

I have no doubt, therefore, that these are two independent and co-existing rules. The rule against perpetuities originated and was rendered necessary on account of the introduction of executory devises and springing uses, against which the old rule would have been an insufficient protection.

I am clearly of opinion that the decision of Mr. Justice Kay was right, and that the appeal should be dismissed.

FOSDICK *v.* FOSDICK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS. 1863.

[*Reported* 6 *Allen*, 41.]

MERRICK, J. This is a bill in equity brought by the plaintiff as executor and trustee under the will of Mary Woodbury, to obtain the instructions and directions of the court in relation to his duty in the execution of a trust, and as to the proper and legal management, disposal and distribution of that portion of the estate of the testatrix which shall be and remain in his hands after the payment of all the legacies and bequests concerning which there is no dispute or conflict of claim.

The will was made January 10, 1857, and the testatrix died October 3, 1860. Her daughter Mary L. Fosdick, who was her only child and heir at law, and then the wife of the plaintiff, survived her, having six children, one of whom was born after the making of the will. On the 4th of November, 1860, she gave birth to another child, named Sarah Woodbury Fosdick; and she herself died on the 25th day of the same month of November. All of her said children are still living.

The testatrix appointed David Fosdick, Jr., the plaintiff, and her brother Samuel Lawrence to be executors of the will, and in the residuary clause of it gave, devised and bequeathed to them all the rest and residue of her estate, to hold the same in trust, with directions to place and keep the same placed out at interest, on good and sufficient security of bonds, or notes and mortgages; and out of the interest or income of the trust fund or estate to pay annually the sum of seventy-five dollars towards the support and maintenance of her sister-in-law Lydia Woodbury, who is insane; also to pay annually the interest or income of five thousand dollars to the said David Fosdick, Jr., during his natural life, and afterwards, if she should survive him, to his wife, the said Mary L. Fosdick, during the remainder of her life.

In describing the further trust upon which the bequest to the executors was made, the testatrix adds: "All the rest and residue of the interest and income which may from time to time arise or accrue from the estate given in trust as aforesaid, the said David and Samuel, trustees aforesaid, and their successors, are directed to retain and place and keep the same placed out at interest, on good and sufficient security as aforesaid, in order that said trust fund or estate may accumulate until my youngest grandchild may, if living, attain the age of twenty-one years; then said trustees are directed to pay over annually to my grandchildren, in equal shares, all the annual interest and income of said trust fund or estate which is not hereinbefore specifically disposed of." She then orders and directs to whom the share of the income thus to be paid to each of her grandchildren shall be paid in

the case of their deaths, respectively, and further orders and directs that this interest and income shall continue so to be paid "during the lifetime of the last survivor of my grandchildren;" and she concludes by directing that "upon the decease of the last survivor of my said grandchildren, it is my will and I hereby order that said trust fund or estate, together with any increase and income thereof, shall be equally distributed among the legal heirs of my several grandchildren, and the surviving wives or husbands of my several grandchildren, if any such there be, share and share alike; and I hereby order said trustees to pay over the same to my said heirs, and any such surviving husband or wife of my several grandchildren, accordingly, share and share alike."

The question which arises upon these provisions of the will, and in relation to which the plaintiff seeks for the instruction and direction of the court, is, whether these several bequests of the interest and income of the accumulated fund to the grandchildren of the testatrix, and to the several persons who are to receive it, in case of the death of any one or more of them, until the death of the last survivor of the grandchildren, and of the fund itself to the persons described after the occurrence of that contingency, are void as being too remote and in violation of the rule against perpetuities.

This rule is imperative and perfectly well established. An executory devise either of real or personal estate is good, if limited to vest within the compass of a life or lives in being, and twenty-one years afterwards; adding thereto, however, in case of an infant *en ventre sa mere*, sufficient to cover the ordinary time of gestation of such child. But the limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void. And whenever there is a limitation over which cannot take effect by reason of its being too remote, the will is to be construed as if no such provision or clause were contained in it; and the person or persons otherwise entitled to the estate or property will take it wholly discharged of the devise, bequest and limitation over. *Sears* v. *Russell*, 8 Gray, 97; *Brattle Square Church* v. *Grant*, 3 Gray, 142. If therefore it be found, upon examination of the provisions of the will of Mrs. Woodbury, that the bequeathed shares and portions of the interest or income of the accumulated fund therein required to be created, and also of the accumulated fund itself, may by possibility not vest in the legatees or beneficiaries to whom they are respectively given within twenty-one years and ten months after a life or lives in being, then the limitation over is too remote, and the bequests are void.

When there is a bequest to a class of persons, as to the children or grandchildren of the testator, and he fixes a time for the distribution of the fund bequeathed, in such way and manner as to admit of the participation in it of all the children that a particular person may have,

whenever born, then the after-born children, that is, born after the death of the testator, will be entitled to share as legatees with the others in the fund. Thus, if the bequest be to all the children of B., to be paid when the youngest attains the age of twenty-one years, this is a postponement of the period of distribution until the youngest child which B. may have shall arrive at that age, and necessarily and properly lets in all the after-born children of B. as legatees. 1 Roper on Leg. 47 ; 2 Jarman on Wills, 78. This rule in relation to the construction of wills appears to be affirmed without exception by all the authorities. *Hughes* v. *Hughes*, 2 Bro. C. C. 434 ; *Annable* v. *Patch*, 3 Pick. 360 ; *Weston* v. *Foster*, 7 Met. 297 ; *Hubbard* v. *Lloyd*, 6 Cush. 522.

Now in recurring to the will of Mrs. Woodbury, it is seen that she bequeathed in equal shares to her grandchildren, or, in case of the death of any one or more of them, to other persons particularly described, in their stead respectively, all the income which, during the life of the survivor of them, may accrue upon the fund to be accumulated by the trustees according to the specific directions for that purpose given them, and also, upon the decease of the last of said survivors, the fund itself, to the legal heirs and the surviving husbands and wives of the several grandchildren, share and share alike. These bequests are given to the legatees in each of these cases as a class of persons particularly described. And the respective periods of time when the distribution of the income to be derived from the accumulated fund shall commence, that is to say, the time before the arrival of which no part of such income shall be paid to or received by any of the persons entitled thereto, and when the accumulated fund itself shall be paid over to the legatees to whom it is given, are carefully and definitely fixed and prescribed by the testatrix. It follows therefore, as a necessary consequence from the rule and principle of law in the construction of wills above stated, that any grandchild born after her decease would be entitled to be let in, and to share equally with the others, in such income, as one of the legatees. And as at her decease her daughter, Mrs. Fosdick, was living and might, as she in fact did at a subsequent time, give birth to a child, who would thereupon become a legatee, and as the trustees were to continue to accumulate the fund until such child, if living, should arrive at the age of twenty-one years, it is obvious that all the bequests are limited over a life or lives then in being, namely, the lives of all the grandchildren living at the decease of the testatrix, to certain described legatees in whom the same would become vested, and to whom the same would be payable at future indefinite periods of time, which periods can be ascertained and determined only upon the actual occurrence of the prescribed contingencies. All these contingencies may be, and in the will are, definitely and exactly described, so that when the events occur they may be certainly known. And that the lives of those grandchildren constitute the lives in being which are to precede the commencement of the term of twenty-one years and ten months after the death of each and all of them is appar-

ent from the consideration that if any or all of them should die before any part of said accumulated fund or of the interest and income thereof becomes distributable, the legacies do not vest in any such deceased grandchild or in their heirs, but are in that event given over and bequeathed to certain other persons particularly designated and described, who will not take any share or portion thereof as heirs at law, or by descent under the Statute of Distributions, but directly under the will as legatees. It is immaterial at what time Mrs. Fosdick, after giving birth to a child subsequently to the decease of the testatrix, may die, or how long she may live, for the vesting of the legacies does not depend at all upon the termination of her life. They are to become vested at a certain fixed period after the youngest grandchild shall attain to the age of twenty-one years; so that such vesting cannot be affected by her death, whether it shall occur before or after that time. The trustees are to keep in their hands all the estate not otherwise specifically disposed of safely secured on interest, until the youngest grandchild shall attain to the age of twenty-one years. The accumulated fund, therefore, from which an income is to be derived by the trustees may not be created and established until twenty-one years from and after the birth of the grandchild born after the death of the testatrix. The fund being then established, the "annual" interest and income of it is to be "annually" paid over to and received by the respective legatees, according to the terms of the several bequests and of the express provisions in the will. It is a necessary and inevitable implication from these provisions concerning the annual payment of the annual interest and income of the accumulated fund, that no portion of it will or can become payable to any one of the legatees until the end of one year after the fund itself is created and established; for no annual interest can before that time have accrued upon it. And until that time it is impossible that any part of such income can become legally vested in any one to whom any portion of it is bequeathed, because until the arrival of that time it is and must remain uncertain who are the legatees who will then be entitled to receive it; for according to the provisions in the will the share or portion which each one of the grandchildren would, if living, be entitled to receive is, upon his or her death, bequeathed and to be paid either to the surviving brothers and sisters, or the surviving wife or husband, or the children, or the appointees under the will of the deceased, as certain particularly enumerated and prescribed events and contingencies shall or shall not occur. Thus it may happen that the earliest possible time when any portion of the interest or income of the accumulated fund can become vested in any one of the legatees may be twenty-two years after the birth of a child born after the death of the testatrix; and the end of this term of twenty-two years may be more than twenty-one years and ten months after the extinction of all said lives in being, that is, after the death of all of said grandchildren who were living at the time of the decease of the testatrix. For it certainly was possible that all those

grandchildren might die either before the birth of the after-born child of Mrs. Fosdick, or so soon after that event that there would remain, after the day of the death of the last survivor of them, more than twenty-one years and ten months to the end of said twenty-two years, which is at once seen to be a limitation over of the bequests of the income of the accumulated fund which is too remote, and of greater extent and duration than the law allows, and which therefore necessarily invalidates all the legacies and bequests to which it is applicable. It is entirely immaterial that the occurrence of the death of each and of all these persons at such early time or times is extremely improbable. It is enough that it is possible that it should be so; for by the fixed and imperative rule of law, all legacies and bequests which will not necessarily, or which by mere possibility may not, become vested within the prescribed period of time after the extinction of preceding lives in being, are invalid and void.

Every person of full age and sound mind may dispose of his real and personal estate by his last will and testament. Gen. Sts., c. 92, § 1. But the right to make such testamentary disposition is not absolute and unlimited; but is subject to all the regulations, restraints and control imposed upon its exercise by positive enactments of the legislature, and also by the rules and principles of the common law which remain in force. Any provision which a testator may make in violation of such prescribed and existing rules and regulations is unauthorized and illegal; and his will is to be construed as if nothing of that kind were contained in it; and all of his estate which is not disposed of under such a construction of his will descends to and becomes distributable among his heirs at law and next of kin, under the provisions of the Statutes, in the same manner as if he had died intestate. Gen. Sts., *c.* 92, § 1.

Applying these principles to the provisions in the will of Mrs. Woodbury, the conclusion is direct and obvious. It has been shown that all the bequests made by her of the income and interest of the accumulated fund are void, because they are in violation of the rule against perpetuities. This objection to the several bequests of the principal from which such income and interest are to be derived, that is, of the fund itself, is equally conclusive; for as none of those legacies is to become vested until after the death of the last surviving grandchild, it may happen that an after-born child of the daughter of the testatrix shall survive for many years beyond the time when any part of such income and interest shall first become payable; and hence it follows that all the gifts and bequests of the rest and residue of her estate, except those in relation to the annuities to be paid to Mr. Fosdick and for the benefit of Lydia Woodbury, being inoperative and void, all that part of the estate remaining in the hands of the trustees, and which is not required for the payment of those annuities, descended as intestate estate to her daughter, Mrs. Fosdick, as her heir at law; and as it consisted wholly of personal property, and as she made no will, the

plaintiff as her husband became entitled upon her death to the whole of it as his own. Gen. Sts., *c.* 94, § 16. He has been duly appointed administrator of her estate, and is now the sole trustee under the will of Mrs. Woodbury, Mr. Lawrence, the other trustee named by her, having declined the trust; and he has the whole of said trust estate in his possession, and holds it as his own, subject only to the due execution of the trust in reference to the annuity given for the benefit of Lydia Woodbury; for it would be absurd to say that he held his own property in trust to pay the income of a part of it to himself.

It has been urged by the counsel for the respondents, that although the bequests of the income and principal of the accumulated fund provided for in the will may be all void as being in violation of the rule against perpetuities, yet that the direction for the accumulation which is not in any event to extend beyond twenty-one years after the extinguishment of the life of Mrs. Fosdick is valid, and creates a resulting trust in favor of the heirs at law of the testatrix, which should be upheld and administered for their advantage. But no such trust was created or intended to be created by her. Her bequests were such that large portions of the income and all of the principal of the accumulated fund might be wholly diverted from the heirs at law, and go to the husbands and wives of the grandchildren. The accumulation directed by her was not intended to be and cannot be construed or treated as an independent provision for the benefit of the former; but the whole scheme was strictly subservient to the other purposes declared in her will, and was contrived and arranged merely for their accomplishment. And since it is found that the bequests are illegal and void, everything which was auxiliary to and designed to carry into effect the provisions of the will in relation to them must also be considered as unauthorized and inoperative. In the cases cited by the counsel for the plaintiff, the rule seems to be fully and clearly affirmed, that where the trust cannot be sustained, the direction for investment and accumulation necessarily falls with it, and the property will then vest at once in the heir at law or next of kin. Such seems to be an obvious, reasonable and necessary conclusion from the principle that if the devise or bequest is void it shall be wholly disregarded, and the party otherwise entitled to the estate shall take and receive it in the same way and with the same rights as if no such testamentary disposition had been attempted. And therefore an order for the accumulation of a fund which the law will not allow to be distributed according to the terms of an unauthorized and illegal bequest, will not be allowed to stand in the way of heirs at law, or of any other party, entitled to present and immediate possession.

The bill is accordingly to be disposed of by entering a decree to this effect.

S. Bartlett and *W. Warren, Jr.*, for the plaintiff.

L. Shaw, for the defendants.

SLADE *v.* PATTEN.

SUPREME JUDICIAL COURT OF MAINE. 1878.

[*Reported* 68 *Maine*, 380.]

BILL IN EQUITY, asking the construction of a will.

W. L. Putnam, for the complainants.

N. Webb, for Ann Augusta Whittlesey *et als.*

C. W. Larrabee, for George P. Slade *et als.*

M. M. Butler and *B. F. Thomas*, for Statira Elliot.

S. C. Strout and *H. W. Gage*, for James T. Patten *et als.*

APPLETON, C. J. This is a bill in equity, brought in pursuance of the provisions of R. S., *c.* 77, § 5, by the complainants claiming under the will of George F. Patten, to obtain the construction of the same. All having an interest in the question to be determined have been made parties to the bill, and have entered an appearance.

The will is in these words: "I give, devise, and bequeath, all and singular, my estate, real and personal, as follows; that is to say, to each and all my children an equal part or proportion of all and singular my property, viz.: To Catherine F. Walker, Hannah T. Slade, wife of Jarvis Slade, James T. Patten, Statira Elliot, wife of John Elliot, Paulina Tappan, wife of Winthrop Tappan, Augusta Whittlesey, wife of Eliphalet Whittlesey, and George M. Patten, one seventh part to each of them and their heirs, with the proviso, that the parts and proportions hereby devised and bequeathed to Catherine F. Walker, Statira Elliot, Paulina Tappan and Augusta Whittlesey and their heirs, instead of passing into their hands, is to go into the hands of James Slade, of New York, and George M. Patten, of Bath, whom I hereby appoint trustees, to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit of said Catherine F. Walker, Statira Elliot, Paulina Tappan and Augusta Whittlesey and their heirs, according to the discretion of said trustees."

It is apparent that the testator intended to treat all his children with perfect equality, giving "to each and all his (my) children an equal part and proportion of all and singular his (my) property;" and, while he placed "the parts and proportions" of four of his daughters in the hands of trustees, the trustees were "to hold, manage and dispose of said parts, and the property received therefor, for the use and benefit" of his said daughters and their heirs. True, it was to be according to the discretion of the trustees, but that discretion related solely to the holding, managing and disposing of these parts. There is no provision for the termination of the trust estate. It continues for the heirs of the daughters named, equally as for the daughters.

If the trustees are to hold the estate for the four daughters and the heirs of the daughters, then the trust is void as creating a perpetuity.

But it has been argued that the intention of the testator was that the trust, as to each of his daughters, should cease as to such daughter and vest in the children of such daughter. But this is against the express terms of the will, by which the trustees are to hold the estate "for the use and benefit" of the four daughters named "and their heirs." The trust is as much for the heirs of the daughters as for the daughters. The will makes no provision for the termination of the trust at the death of the daughters or their heirs. It continues as much for the latter as for the former. The devise is one and indivisible to the trustees to hold, manage and dispose of, for the use and benefit of the daughters and their heirs. In no legal sense can the daughters be deemed the first takers, and the trust valid as to them and not as to their heirs.

But assuming it to have been the testator's intention that on the decease of his daughters their respective shares should go to the heirs of such daughters in fee simple, still, this would create a perpetuity, because it was possible, that they might have heirs unborn at the testator's death and in whom the estate would not vest within lives in being and twenty-one years and a fraction afterwards.

"This rule is imperative and perfectly well established. An executory devise, either of real or personal estate, is good," observes Merrick, J., in *Fosdick* v. *Fosdick*, 6 Allen, 41, "if limited to vest within the compass of a life or lives in being, and twenty-one years afterwards; adding thereto, however, in case of an infant *en ventre sa mere*, sufficient to cover the ordinary time of gestation of such child. But the limitation, in order to be valid, must be so made that the estate, or whatever is devised or bequeathed, not only may, but must necessarily, vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void." In any view of the trust, therefore, it must be deemed void, as creating a perpetuity. 1 Perry on Trusts, §§ 381, 382, 383.

Here, in the first instance, there was an absolute gift to the daughters and their heirs. Upon this gift a limiting or restrictive clause was attempted to be grafted, which, it has been seen, was void. The first gift remains in full force, if the attempted qualification becomes ineffectual. The presumption is that "the testator intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualified one." 1 Jarman on Wills, § 257. "Whenever there is a limitation over," remarks Merrick, J., in *Fosdick* v. *Fosdick*, 6 Allen, 41, 43, "which cannot take effect by reason of its being too remote, the will is to be construed as if no such provision or clause were contained in it; and the person or persons otherwise entitled to the estate or property will take it wholly discharged of the devise, bequest and limitation over. *Sears* v. *Russell*, 8 Gray, 86, 97; *Brattle Square Church* v. *Grant*, 3 Gray, 142."

The conclusion is that the trust for the daughters is void as creating a perpetuity, and the absolute gift remains.

It is obvious that there are no words of inheritance in the trustees. But that cannot be deemed material. Courts of equity do not permit a trust to fail for want of trustees. Their tenure is to be determined by their powers and duties. "The intent of the parties is determined by the scope and extent of the trust. Therefore the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle two rules of construction have been adopted by courts; first, when a trust is created, a legal estate sufficient for the purposes of the trust shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him or his heirs or not; and, second, although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust requires." 1 Perry on Trusts, § 312. Courts will imply an estate in the trustees, though no estate is given them in words, to carry into effect the intention of the parties. The absence of words of inheritance in the trustees would not be held to limit the duration of the trust to their lives, if the trust were a valid one. But the trust being void, for the reasons already given, the estate of the trustees must cease; as no provision has been made for a trust which could be carried legally out.

The devise to Mrs. Elliot differs from that to the other daughters. The provisions of the will as to her stand thus: First, there is a devise to her and her heirs. Then a trust is interposed, which we have seen is void, followed by the following clause: "In case that Statira Elliot should die before her husband and leave no children, I will that her part, after the expiration of six years, be transferred by the trustees over to the parties of the other six heirs, and to be equally divided between them."

Leaving out of consideration the trust as void, there is first a gift to her and her heirs, but in case she dies before her husband leaving no children, then over. This is as if he had said to Statira Elliot and her children, but in case she dies leaving no children, then over. The doctrine is thus stated: "When a testator in the first instance devises land to a person and his heirs, and then proceeds to devise over the property in terms which show that he used the word heirs in the prior devise in the restricted sense of heirs to the body; such devise confers only an estate tail, the effect being the same as if the latter expression had been originally employed." 2 Jarman, 238. "If, therefore," remarks Shaw, C. J., in *Nightingale* v. *Burrell*, 15 Pick. 104, "an estate is devised to A. and his heirs, which is a fee; and it is afterwards provided that if A. die without issue, then over, this reduces it to an estate tail by implication. The law implies that by 'heirs' in the first devise, was intended heirs of the body, and it also implies from the proviso, that it was not the intent of the testator to give the estate over and away from the issue of the first devisee, but, on the contrary, that such

issue should take after the first devisee." *Parkman* v. *Bowdoin*, 1 Sumn. 367. The cases cited by the counsel for Mrs. Elliot lead to the conclusion that she would be entitled to an estate tail in the real estate.

But the words which will create an estate tail when applied to real estate, will give an absolute interest when applied to personalty. "The same limitation under the English law, which would create an estate tail if applied to real estate, would vest the whole interest absolutely in the first taker if applied to chattels." 4 Kent Com. 283. *Hall* v. *Priest*, 6 Gray, 18, 22.

Such might have been the legal rights of Mrs. Elliot had there been no attempt at creating a trust estate, but this provision cannot be eliminated from the will. It is there. If the trust is void as to one daughter, it is void as to all. Equality among the children is the rule. It was not the intent that three daughters should have an absolute estate in their shares and the fourth to have an interest only for life. Now to set aside the trust as to three of the daughters and giving such a construction to the will as would give Mrs. Elliot a life estate only in case she survived her husband, thus limiting her only to her income, so that the estate may be kept intact to meet the contingency of her dying and leaving no children, would be the making a will the testator never made and defeating his manifest intent of giving "to each and all his (my) children an equal part and proportion of his property."

If the trust was void from the beginning, then those named as trustees never held any of her property as trustees to be transferred to the heirs.

The result is that the trust as to the daughters is void as creating a perpetuity; and, as it is the manifest intention of the testator to divide his estate equally among his children, the special clause as to Mrs. Elliot is so connected with and dependent upon the trust clause, that if that fails this fails with it, and, as they hold the estate devised as an absolute gift, so equally does she.

According to the true construction of the will of George F. Patten, it is declared:

I. That the trust attempted by said will to be vested in the complainants is wholly void.

II. That the children of Catherine F. Walker, deceased, are entitled to receive payment, delivery and conveyance of a share, to wit: one fourth of the principal and body of the estate in the hands of the complainants, to the use of themselves, their heirs and assigns forever, absolutely and free of all control from the complainants.

III. That said Statira, Paulina and Augusta are each entitled to receive payment, delivery and assignment of a share, to wit: of one fourth of the principal and body of the said estate in the hands of the complainants, each to the use and behoof of herself, her heirs and assigns forever, free from the control of these complainants.

IV. That these complainants may and shall pay, deliver and assign to said Statira, Paulina and Augusta, and to the children of said

deceased Catherine, any and all of the principal and body of the estate in their hands to the use of said Statira, Paulina, Augusta, and to the heirs and assigns of each forever, and to the use of the heirs of said Catherine, their heirs and assigns, their respective and several shares, free from the control of the complainants.

And it is ordered and decreed that the costs of the proceeding be charged upon the estate of Statira, Paulina, Augusta and the heirs of Catherine.

Walton, Barrows, Danforth, Virgin and Libbey, JJ., concurred.

SECTION II.

SEPARABLE LIMITATIONS AND GIFTS TO CLASSES.

LONGHEAD d. HOPKINS *v.* PHELPS.

King's Bench. 1770.

[*Reported* 2 *W. Bl.* 704.]

Ejectment and special case. 30th and 31st August, 1706, John Phelps, in consideration of an intended marriage with Mary Moore, conveyed the premises in question to the use of himself and his heirs till the marriage. And from the marriage to trustees for forty years, on trusts which never took effect; remainder to John Phelps for ninety-nine years, if he so long lived; remainder to trustees for the life of John Phelps, to preserve contingent remainders; remainder in case Mary Moore should survive John Phelps, to trustees for fifty years, on trusts which never took effect; remainder to Mary Moore for life for her jointure; remainder to trustees for 1000 years on trusts after-mentioned; remainder to the first and other sons of John Phelps on said Mary begotten successively in tail male; remainder to the right heirs of John Phelps. The trust of the 1000 years' term was declared, that, "in case the said John Phelps should happen to die without issue male of his body, on the body of the said Mary begotten, or if all the issue male between them shall happen to die without issue, and there should be issue female of the marriage, which should arrive respectively to the age or ages of eighteen years, or be married: Then, from and after the death of the survivor of John Phelps and Mary Moore without issue male, or in case at the death of the survivor there shall be issue male, then from and after the death of such issue male without issue, the trustees should raise £500 for one daughter, £1000 for two; and, in case of three or more, should assign the whole term to their use; with a clause of maintenance till eighteen or marriage." There was issue of this marriage one son, Richard, and four daughters, who all lived to eighteen, and were married; and they, or their representatives, are the now

defendants. 1731, John Phelps died. 1744, Richard Phelps, the son, died without issue; but devised to his wife, Mary, (who afterwards married Thomas Hopkins, the lessor of the plaintiff), *inter alia*, the premises in question. 1760, Mary, the mother, died, and the four daughters entered, against whom this ejectment is brought.

Glyn, Serjeant, for the plaintiff, argued, that the trusts of the term were void, being on too remote a contingency, — the dying of the issue male of the marriage without issue generally.

But the COURT, without hearing counsel for the defendants, were clear that the first part of the contingency was good, viz., "in case John and Mary died without leaving issue male." And as that happened in fact to be the case, they would not enter into the consideration how far the other branch of the contingency might have been supported; which could only come in question, in case Richard had survived both his parents. So ordered the

Postea to the defendants.

PROCTOR *v.* BISHOP OF BATH AND WELLS.

COMMON PLEAS. 1794.

[*Reported* 2 *H. Bl.* 358.]

IN this *quare impedit*, brought to recover the presentation to the church of the rectory of West Coker in Somersetshire, the declaration stated, that one William Ruddock was seised in fee of the advowson, and presented, that on his death it descended to his two nieces Jane and Mary Hall, that Jane Hall intermarried with Nathaniel Webb, and Mary with Thomas Proctor: that Nathaniel Webb died, his wife surviving him, whereby the said Jane in her own right, and Thomas Proctor and Mary in her right were seised, that the church then became vacant by the death of the incumbent, whereby the said Jane Webb and Thomas Proctor in right of the said Mary, presented their clerk; that Jane Webb died, upon whose death her whole share of the advowson descended to her son Nathaniel Webb, who thereupon became seised in fee in coparcenary, with Thomas Proctor and Mary his wife; that Thomas Proctor died, his wife surviving him, whereby the said Nathaniel Webb the son, and Mary Proctor became seised. There were then set forth several presentations on vacancies by Nathaniel Webb and Mary Proctor. The death of the said Nathaniel Webb was then stated, whose share descended to his son Nathaniel Webb, who became seised in coparcenary with Mary Proctor: that Mary Proctor died, upon whose death her share descended to her grandson Thomas Proctor, who became seised, together with the last-mentioned Nathaniel Webb: that the church again became vacant, upon which they not agreeing upon any person to be presented by them jointly, the said Nathaniel Webb presented the said Thomas Proctor, as in the first turn of the said Jane

Webb, the elder sister of the said Mary Proctor: that he died and his share descended to Elizabeth Proctor, his sister, the present plaintiff, who was entitled to represent in the first turn of the said Mary Proctor, the younger sister of the said Jane Webb, yet, &c.

The bishop pleaded the usual plea as ordinary; and the other defendants — That true it was that the said Nathaniel Webb the grandson of Jane Webb and the said Mary Proctor were seised of the advowson in coparcenary, and that Mary Proctor died so seised, and that the said Nathaniel Webb presented as in the first turn of the said Jane Webb, &c.: but the said defendants further said, that the said Mary Proctor being so seised made her last will and testament, and gave and *devised unto the first or other son* of her grandson, the said last-mentioned Thomas Proctor, *that should be bred a clergyman and be in holy orders*, and to his heirs and assigns all her right of presentation to the said rectory, &c.: *but in case her said grandson the said last-mentioned Thomas Proctor should have no such son*, then she gave and devised the said right of presentation unto her grandson the said Thomas Moore, his heirs and assigns forever: that afterwards the said Mary Proctor died so seised, leaving the said last-mentioned Thomas Proctor and Thomas Moore her surviving, and that afterwards the said Thomas Proctor died *without having ever had any son*; whereby and by virtue of the said last will and testament of the said Mary Proctor, the said Thomas Moore became seised of all the share of the said Mary Proctor of and in the said advowson, &c., wherefore it belonged to the said Thomas Moore to present, &c. as in the first turn of the said Mary Proctor the younger son of the said Jane Webb, &c.

To this plea there was a general demurrer, which was twice argued; the first time by *Bond*, Serjt., for the plaintiff, and *Heywood*, Serjt., for the defendants; and a second time by *Adair*, Serjt., for the plaintiff, and *Le Blanc*, Serjt., for the defendants.

The Court (absent Mr. Justice Buller) were clearly of opinion that the first devise to the son of Thomas Proctor was void, from the uncertainty as to the time when such son, if he had any, might take orders; and that the devise over to Moore, as it depended on the same event, was also void; for the words of the will would not admit of the contingency being divided, as was the case in *Longhead* v. *Phelps*, 2 Black. 704; and there was no instance in which a limitation after a prior devise, which was void from the contingency being too remote, had been let in to take effect, but the contrary was expressly decided in the House of Lords in the case of *The Earl of Chatham* v. *Tothill*, 6 Brown Cas. in Parl. 451, in which the judges founded their opinion on *Butterfield* v. *Butterfield*, 1 Vezey, 134. Consequently the heir-at-law of the testatrix was entitled.

Judgment for the plaintiff.[1]

[1] "As I understand the rule of law it is a question of expression. If you have an expression giving over an estate on one event, and that event will include another

LEAKE *v.* ROBINSON.

CHANCERY. 1817.

[*Reported* 2 *Mer.* 363.]

JOHN MILWARD ROWE, by his will, dated the 17th of June, 1790, gave to the plaintiffs (whom he appointed executors,) all his three per cent. and four per cent. stock, upon trust, in the first place, to pay to his wife, Sukey Rowe, during her life, two several annuities of £245 8*s*., and £168, out of the dividends of the four per cents, (which with certain other provisions, were declared to be in bar of dower and thirds,) and in the next place, to pay and apply an annuity of £54 12*s*. (thereby given) towards the maintenance, education, or advancement of his grandson, William Rowe Robinson, until he should attain twenty-five; and from and after his attainment of that age, to pay him the said annuity during his life; and after his decease, the testator bequeathed the principal sum of £1,820, (part of his three per cent. annuities,) or so much thereof as should produce the annual sum of £54 12*s*. as after mentioned; and after the decease of his wife, he directed that his said

event which itself would be within the limit of perpetuities, or, as I say, the rule against perpetuities, you cannot split the expression so as to say if the event occurs which is within the limit the estate shall go over, although, if that event does not occur, the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and if, giving the proper interpretation to that expression, the event may transgress the limit, then the gift over is void.

"What I have said is hardly intelligible without an illustration: On a gift to A. for life with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A. for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a gift superadded, 'or if he shall have no son, is valid, and takes effect if he has no son; yet both these events are included in the other event, because a man who has no son certainly never has a son who attains twenty-five or takes priest's orders in the Church of England, still the alternative event will take effect because that is the expression.

"The testator, in addition to his expression of a gift over, has also expressed another gift over on another event, although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed have held that it will not take effect if it is not expressed, that is, if it is really a gift over on the death before attaining twenty-five or taking priest's orders, although, of course, it must include the case of there being no son. That is what they mean by splitting, they will not split the expression by dividing the two events, but when they find two expressions they give effect to both of them as if you had struck the other out of the will. That shows it is really a question of words and not an ascertainment of a general intent, because there is no doubt that the man who says that the estate is to go over if A. has no son who attains twenty-five, means it to go over if he has no son at all, it is, as I said before, because he has not expressed the events separately, and for no other reason. That is my view of the authorities. This is a question of authorities.

"Now, we come to the case we have before us. The estate is to go over if any of his sons get another estate, that is, if any one of his sons who has got possession of this

executors should pay and apply the annual sum of £145, (part of the annuity of £245 8*s.*) and the annual sum of £40 (part of the annuity of £168,) towards the maintenance of the said W. R. Robinson till twenty-five; and afterwards for his life and after his decease, bequeathed the principal sums of £4,846 16*s.* 8*d.*, three per cents, and £1000 four per cents, as after mentioned.

The testator then directed the plaintiffs to apply the dividends of £3,333 6*s.* 8*d.*, three per cents, for the maintenance and advancement of his grandson, Charles Mitford, until twenty-five, and upon his attaining that age, to transfer to him the said principal sum of £3,333 6*s.* 8*d.*, three per cents.

He then gave to the plaintiffs £1,000 India stock upon trust, to apply the dividends, &c. thereof, and also the annual sum of £100, (part of the dividends, &c. of his three per cent. stock.) or so much as they should think fit, towards the maintenance, education, and advancement of his said grandson, William Rowe Robinson, until twenty-five; and upon his attaining that age, he gave to him the dividends of the said stock during his life; and after his decease, he bequeathed the said £1,000 East India stock, and the sum of £3,333 6*s.* 8*d.* three per cents, (the dividends whereof then produced £100 per ann.) as after mentioned.

estate gets one of the other estates, or if any of the issue male of the body of any of the sons gets the estate. Here you have two events expressed. He might have said, if any of the issue male of my body get the estate, which would have included both events, and then you could not have split it up, but he has not said so. He has divided it for some reason or other, probably a conveyancer's one, because it is an alteration of a conveyancer's form. The words 'sons' and 'issue male' are both added, but he has divided that and suggests two events, then and in any of the events 'and so often as the same shall happen the uses hereby limited of and concerning my freehold hereditaments to or in trust for any such younger son or whose issue male shall for the time being become entitled as aforesaid, and to or in trust for his issue male shall absolutely cease.' That is, there is a cesser of the estate either of the younger son or the issue male of the younger son. Why should I alter the words? Why should I say that the event of the younger son properly expressed succeeding to the estate being in due time is to be void for remoteness? The reason suggested to me is this, it is quite plain he means it to go along the whole line. I agree.

"So in the case of a man dying without a son attaining twenty-five. That is not good although he means it to apply to the case of his having no son, and there is none. It is not what he means as to the event, but whether he has expressed the event on which the estate is to cease, so as to bring one alternative within the limits, and if he has chosen to say the estate is to cease first of all, as he might have said if a younger son becomes a peer or attains the age of fifty, or any other event within the limits, or any of the issue male of my younger sons shall become a peer, one gift over might be valid, he might have said if any of my issue male shall become a peer, or if the issue male of my younger son become a peer thereupon the estate shall go over, that would have been different, but I think I have no right to alter the expression. The law is purely technical. The expressions are there, and using them gives effect to the real intention. Why should I go out of my way to extend technical law to a case to which it has not hitherto been extended? It seems to me that I ought to read the expressions as I find them. The event which is expressed has happened. It is within legal limits, and I think the estate should go over." — *Per* JESSEL, M. R., in *Miles* v. *Harford*, 12 Ch. D. 691, 702-705

The testator then devised and bequeathed to the plaintiffs, their heirs, &c. all his real estates at Westham and Pevensey, of which he was seised in fee, or as mortgagee in possession, or otherwise, and the principal sums charged thereon, and the ground-rents issuing out of his messuages in Hedge Lane, upon trust to apply the said ground-rents, and the rents and profits of his said estates, and interest of the said mortgage moneys, or such parts as they should judge proper, towards the maintenance, education, or advancement of his said grandson, William Rowe Robinson, until twenty-five; and after his attaining that age, to pay to, or permit him to have and receive the same during his life, and after his death, (in case he should leave any lawful issue,) to pay and apply the said several annual sums of £54 12*s.* £145 8*s.* £100 and £40, and the dividends of the said £1,000 India stock, and the rents and profits of the said estates at Westham and Pevensey, and the interest of the said mortgage moneys, and the said ground rents, or such part thereof as they (the plaintiffs) should think proper, unto, and for the maintenance, education, and advancement of all and every the child and children of the said William Rowe Robinson, lawfully begotten, until (being sons,) they should respectively attain twenty-five, or (being daughters,) should attain such age, or marry with the consent of parents or guardians; and then to pay, transfer, and assign an equal proportion of the said several principal sums of £1,820, £4,846 16*s.* 8*d.*, and £3,333 6*s.* 8*d.* three per cents, £1,000 four per cents, and £1,000 East India stock, and the said ground-rents and estates at Westham and Pevensey, and the mortgage moneys, and all the interest, dividends, or rents due or payable in respect of the same, "to such child or children, being a son or sons, who shall attain such age or ages of twenty-five as aforesaid, and to such child or children, being a daughter or daughters who shall attain such age or ages, or be married as aforesaid, his, her, or their heirs, executors, or administrators; if only one such child, or, having been more, if all but one should die, before their shares should become payable as aforesaid, then the whole to such only, or surviving child."

The testator then directed as follows; that "in case the said William Rowe Robinson shall happen to die without leaving issue, living at the time of his decease, or leaving such, they shall die all before any of them shall attain twenty-five, if sons, and if daughters, before they shall attain such age, or be married as aforesaid;" then the plaintiffs should pay, apply, and transfer the said principal sums of stock, ground-rents, estates and mortgage moneys, "unto and amongst all and every the brothers and sisters of the said William Rowe Robinson, share and share alike, upon his, her, or their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage, with such consent as aforesaid."

He then directed the plaintiffs to invest the surplus or savings to arise out of the said several annuities, dividends, ground rents, and interest, until his said grandson, William Rowe Robinson, or his issue,

(if any), or his brothers and sisters who should become entitled as aforesaid, should attain twenty-five, or be married as aforesaid, and pay and apply the same for the benefit of the person or persons entitled, upon the attainment of such age or marriage respectively.

The testator then (after making certain provisions out of the remainder of his stock before bequeathed to the plaintiffs for others of his grandchildren,) gave to the plaintiffs, their executors, &c. all sums of money then due to him on mortgage, (except those secured on the estates at Westham and Pevensey,) upon trust, to pay one moiety of the interest to his daughter Mrs. Robinson, for her life, and after her death, to her husband, George Robinson, for his life, and after the death of the survivor, in and towards the maintenance and advancement of W. R. Robinson, till twenty-five, and after, &c. to W. R. Robinson for life, and after his decease, towards the maintenance and advancement of all and every his child and children, till twenty-five, or marriage as aforesaid, and upon trust, to pay or assign an equal proportion of such moiety of the said mortgage moneys, to such child or children respectively, and in case the said William Rowe Robinson should die without leaving issue, or all such issue should die before twenty-five, or marriage as aforesaid, then upon trust to pay and divide the same, unto and among all and every the brothers and sisters of the said William Rowe Robinson, share and share alike, at their respective ages of twenty-five, or marriage as aforesaid; with interest in the mean time, for such brothers and sisters, as before directed with respect to the issue (if any) of the said William Rowe Robinson.

He then directed the plaintiffs to pay the other moiety of the interest due to him on mortgage, to his daughter Frances Dippery Mitford, and her husband William Mitford, for their lives and the life of the survivor, and after the decease of the survivor of them, to pay and dispose of the said interest and principal moneys, to and among their children, in the same manner as he had before directed, with respect to the issue (if any) of the said William Rowe Robinson.

The testator then gave to the plaintiffs, their heirs, executors, &c. all the residue and remainder of his real and personal estate and effects not before disposed of, upon trust to sell, (in case his daughters should think proper and so direct,) and lay out the produce in the purchase of real estates or government securities, and out of such real and personal estate till disposed of, and the produce, &c. to pay one moiety of the rents, interest, and dividends to his daughter, Mrs. Robinson for her life, and after her death, to her husband for his life, and after the death of the survivor, to pay and apply the said moiety, or so much thereof as they should think fit, unto, or for the maintenance, education, and advancement of the said child and children of the said Elizabeth Grace Robinson, by the said George Robinson, (other than and except the said W. R. Robinson,) until they should attain twenty-five, or marry as aforesaid, in equal shares and proportions, and after the attainment of such age or marriage, to pay and transfer all such moiety of the residue

or produce thereof, to and among such child or children, in equal shares and proportions, and with regard to the remaining moiety, he directed that his daughter Mrs. Mitford, and her husband, and the child or children (if any) of them, and their issue, should have and enjoy the same, in the same manner as before expressed with regard to his daughter Mrs. Robinson and her family. The testator then directed that in case of the death of any of his said grandchildren before attaining twenty-five or marriage, the shares of them so dying, should go to the survivors of their respective brothers and sisters; and in case of the death of either of his said two daughters, without leaving issue by her said husband, living at her decease, or any child or children of such issue, then and in such case, the share or proportion of such part of his estate or effects given by him, or intended for such issue, or the child or children of such issue, should go to and be divided amongst the issue of his surviving daughter, by her then husband, or the child or children of such issue who might be dead, equally, share and share alike; and in case both his said daughters should die without issue living at their respective deceases by their then respective husbands, or any child or children of such issue who might be deceased, then he directed that each of his said daughters, (subject to the life interest of their then husbands,) might (notwithstanding their coverture,) give and dispose of her share and proportion of his said estate and effects to such person or persons as she might think proper, either by deed or will.

On the 17th of June, 1790, when the testator made this will, his grandson William Rowe Robinson, had one brother and three sisters living. Between the date of the will and the testator's death, he had another sister born.

On the 9th of February, 1792, the testator died. Between the death of the testator and the death of William Rowe Robinson, the said William Rowe Robinson had two other brothers born. On the 10th of October, 1800, William Rowe Robinson died; having attained twenty-five without issue, unmarried and intestate; and another sister was born after his death.

At the time of the testator's will, and of his death, Mr. and Mrs. Mitford had five children, one of whom was since dead, leaving issue; and after the testator's death, they had another child.

Sukey Rowe, the testator's widow, survived him, and died in 1804, having first made her will, and appointed Mr. Mitford, and another, executors thereof. Mrs. Mitford was also dead, and her husband had taken out administration.

Under these circumstances, the question for the decision of the court was, whether, in the event which happened, of the death of William Rowe Robinson without issue, the limitation to his brothers and sisters, to take effect on their attainment of the age of twenty-five, or marriage as aforesaid, was a good and effectual limitation, or was void, as being too remote. And this principally depended on the determination of two other questions, viz. first, what classes of persons were those intended

by the testator to take, in the event of William Rowe Robinson dying without issue, or without issue living to attain the age of twenty-five, under the description of "all and every the brothers and sisters of the said William Rowe Robinson;" because, if that limitation were held to extend to all the brothers and sisters who might be born, and (in the event which happened) actually were born, after the death of the testator, and the period of vesting was postponed by the will till their attainment of the age of twenty-five, it is obvious that more than twenty-one years, (the period beyond which a limitation by way of executory devise cannot take effect) might pass after the death of the testator before the arrival of the limited time: and this, consequently, gave rise to the second question; which was, whether the attainment of twenty-five was in fact the period assigned for the vesting of the several shares, or was to be taken only as the time fixed for the payment of the several shares which had already vested at some antecedent period.

Sir Arthur Piggott, *Horne*, and *Sugden*, for the defendant, Wm. Mitford, (claiming, on behalf of himself and his children, all such benefits as were intended by the will, and also, as administrator to his deceased wife, one third in the undisposed residue. And claiming also as executor of Sukey Rowe deceased, in the revived suit.)

Sir S. Romilly and *Preston*, for one of the children of Mrs. Robinson born before the date of the will, and another who was born after the date of the will, but in the testator's lifetime.

Hart, *Bell*, and *Shadwell*, for children born before the date of the will.

Horne, for the children of Mr. and Mrs. Mitford.

Pepys, for the children of Mr. and Mrs. Robinson born after the death of the testator.

The Master of the Rolls. [Sir William Grant.] The first point to be determined in this case is, Who are included in the description of brothers and sisters of William Rowe Robinson, and of children of Mr. and Mrs. Robinson, and Mr. and Mrs. Mitford — whether those only who were in being at the time of the testator's death, or all who might come *in esse* during the lives of the respective tenants for life. Upon that point I do not see how a question can possibly be raised. Not only is the rule of construction completely settled, but in this case, I apprehend the actual intention of the testator to be perfectly clear. Indeed, I believe, wherever a testator gives to a parent for life, with remainder to his children, he does mean to include all the children such parent may at any time have. That is not an artificial rule. It is the rule which excludes any of the children that is, and has been called an artificial rule — namely, the rule in *Andrews* v. *Partington*, 3 Bro. C. C. 60, 401, and other cases of that description, which excludes all who may be born after the eldest attains twenty-one. The case of *Ellison* v. *Airey*, 1 Ves. 111, might have been decided the other way without at all affecting this; for there it was the death of one person that determined what children of another person were entitled to take. It is

impossible to impute to this testator an intention to exclude all the children of his grandson, William Rowe Robinson, who should not be living at his (the testator's) own death, that grandson having no children at the time the will was made. All the bequests to the children of his daughters are made in as comprehensive terms.

As to the brothers and sisters of William Rowe Robinson, I do not apprehend that it is at all necessary to speculate on the question suggested by Mr. Bell, viz. who would, within the meaning of the will, come under the description of brothers and sisters — whether only the children of both parents, or such as one of them might have after the death of the other.

Our question is, whether the testator's bounty was confined to *such* brothers and sisters (in whatever sense these words may be taken) as should be living at his own death. According to the established rule of construction, and what I conceive to have been the actual intention of the testator, all who were living at the time of William Rowe Robinson's death must be held to be comprehended in the description.

Having ascertained the persons intended to take, the next question is at what time the interests given to them were to vest.

There is no direct gift to any of these classes of persons. It is only through the medium of directions given to the trustees, that we can ascertain the benefits intended for them. The trustees have a discretionary power to apply what portion of the income they think fit, for the support, maintenance, and advancement of the infant legatees. Except in one instance, the testator does not say what is to become of the surplus interest. In the case of the property first given to William Rowe Robinson for life, the surplus interest is to accumulate, and to be paid with the capital, either to himself, or to his children, or to his brothers and sisters, when they shall have attained the age of twenty-five.

No direction being given as to the surplus interest of the two moieties of the mortgage money, it will make part of the residue; for, although the interest of residue goes with the capital, that of particular legacies does not, even supposing it be the payment, and not the vesting, that is postponed. It is a mistake to suppose that the trustees are authorized to apply any part of the capital for the benefit of any legatee not attaining twenty-five. It is only in the residuary clause that produce is spoken of, and it is evident that the direction relates only to the income of the property, or of the produce thereof when it should be sold.

As to the capital, there being, as I have already said, no direct gift to the grandchildren, we are to see in what event it is that the trustees are to make it over to them. There is, with regard to this, some difference of expression in the different parts of the will. In some instances the testator directs the payment to be to such child or children as shall attain twenty-five. In others the payment is to be made upon attainment of the age of twenty-five. In the residuary clause it is, from and

immediately after such child or children shall attain the age of twenty-five, that the trustees are to transfer the property. But I think the testator in each instance means precisely the same thing, and that none were to take vested interests before the specified period. The attainment of twenty-five is necessary to entitle any child to claim a transfer. It is not the enjoyment that is postponed; for there is no antecedent gift, as there was in the case of *May* v. *Wood*, 3 Bro. C. C. 471, of which the enjoyment could be postponed. The direction to pay is the gift, and that gift is only to attach to children that shall attain twenty-five. The case of *Batsford* v. *Kebbell*, 3 Ves. 363, was much more favorable for the legatee; for the interest of the fund was given to him absolutely until he should attain the age of thirty-two, at which time the testatrix directed her executors to transfer to him the principal for his own use. He died under thirty-two. Lord Rosslyn said, "There is no gift but in the direction for payment, and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description."

It was supposed that the clauses in the will, where the word *such* is left out, might be construed differently from those in which it is inserted; and that, although where the payment is to be to *such* child or children as shall attain twenty-five, nothing could vest in any not answering that description, yet where the payment is to be to children upon the attainment of twenty-five, or from and after their attaining twenty-five, the vesting is not postponed. If there were an antecedent gift, a direction to pay upon the attainment of twenty-five certainly would not postpone the vesting. But if I give to persons of any description *when* they attain twenty-five, or upon their attainment of twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift.

I am aware, however, that although, with regard to particular legacies, this doctrine has not been controverted, yet the case of *Booth* v. *Booth*, 4 Ves. 399, may be considered as throwing some doubt upon it, when it is a residue that is the subject of the bequest. There is certainly a strong disposition in the court to construe a residuary clause so as to prevent an intestacy with regard to any part of the testator's property. With all that disposition, it is evident that Lord Alvanley felt that he had a difficult case to deal with. Some violence was done to the words in favor of what he conceived to be, and what in all probability was, the intention. That intention however was collected from circumstances that do not occur in the present case. Both the legatees were adults at the time the will was made. Lord Alvanley admits that, if it had been otherwise, it might have made some ingredient in the argument. Then the whole interest was given to them absolutely, — a circumstance which has always been held to furnish a strong presumption of intention to vest the capital, and which is not afforded by a direction for mainte-

nance out of the interest, as was decided in the case of *Pulsford* v. *Hunter*, 3 Bro. C. C. 416. The legatees might both live to extreme old age, without the event ever happening on which the legacy was made payable. There was no survivorship between them, nor was there any bequest over in the event of the death of both or either; so that intestacy must have been the consequence of death before marriage. In every one of these particulars this case differs from that of *Booth* v. *Booth*. They agree in nothing, except that the words "from and immediately after" occur in both.

The case of *Booth* v. *Booth* is therefore not merely no authority for what is contended for by the grandchildren, but it is a strong authority the other way. For it shows that, where there is no gift but by a direction to transfer *from and after* a given event, the vesting would be postponed till after that event had happened; unless, from particular circumstances, you are enabled to collect a contrary intention. For otherwise Lord Alvanley would only have had to say, "These words can have no such effect as is ascribed to them. They operate only as a postponement of the enjoyment." Here, interest is not given to children dying before twenty-five. Children attaining twenty-five are to take the whole. There is not even a provision for the case of a child dying under twenty-five, leaving issue. All is to go to those who do attain twenty-five. How is it possible, therefore, that a child can be said to have a vested interest before twenty-five, when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim, until after it shall have attained that age? When the vesting is so clearly and expressly postponed, it is in vain to endeavor to infer from other expressions, used without any reference to that object, that the testator did not conceive himself to have postponed the vesting. That he has unnecessarily provided for survivorship; that he has spoken of *shares* of grandchildren dying under twenty-five, and, in the last proviso, given over the moieties of the residue only in the event of either of his daughters dying without leaving any issue or any children of such issue, — are all of them circumstances that appear to me not at all to affect the question of vesting, as none of these clauses make any new gift to the grandchildren, nor can they alter the terms or conditions of that which had been already made.

Then, assuming that after-born grandchildren were to be let in, and that the vesting was not to take place till twenty-five, the consequence is, that it might not take place till more than twenty-one years after a life or lives in being at the death of the testator. It was not at all disputed that the bequests must for that reason be wholly void, unless the court can distinguish between the children born before, and those born after, the testator's death. Upon what ground can that distinction rest? Not upon the intention of the testator; for we have already ascertained that all are included in the description he has given of the objects of his bounty. And all who are included in it were equally capable of taking. It is the period of vesting, and not the description

of the legatees, that produces the incapacity. Now, how am I to ascertain in which part of the will it is that the testator has made the blunder which vitiates his bequests? He supposed that he could do legally all that he has done; — that is, include after-born grandchildren, and also postpone the vesting till twenty-five. But, if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born grandchildren, rather than abridge the period of vesting? I should think quite the contrary. It is very unlikely that he should have excluded one half of the family of his daughters, in order only that the other half might be kept four years longer out of the enjoyment of what he left them. It is much more probable that he would have said, "I do mean to include all my grandchildren, but as you tell me that I cannot do so, and at the same time postpone the vesting till twenty-five, I will postpone it only till twenty-one." If I could at all alter the will, I should be inclined to alter it in the way in which it seems to me probable that the testator himself would have altered it. That alteration would at least have an important object to justify it; for it would give validity to all the bequests in the will. The other alteration would only give them a partial effect; and that too by making a distinction, which the testator himself never intended to make, between those who were the equal objects of his bounty. In the latter case, I should be new-modelling a bequest which, standing by itself, is perfectly valid; while I left unaltered that clause which alone impedes the execution of the testator's intention in favor of all his grandchildren. Perhaps it might have been as well if the courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained. But the law is otherwise settled. In the construction of the Act of Parliament passed after the *Thellusson cause*, I thought myself at liberty to hold that the trust of accumulation was void only for the excess beyond the period to which the Act restrained it. And the Lord Chancellor afterwards approved of my decision. But there the Act introduced a restriction on a liberty antecedently enjoyed, and therefore it was only to the extent of the excess that the prohibition was transgressed. Whereas executory devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits. If the condition be violated, the whole devise is held to be void.

To induce the court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests, what he never intended them to be, viz. a series of particular legacies

to particular individuals, or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death.

If the present case were an entirely new question, I should doubt very much whether this could be done. But it is a question which appears to me to be perfectly settled by antecedent decisions, and in cases in which there were grounds for supporting the bequests that do not here exist. In *Jee* v. *Audley*, 1 Cox, 324, there were no after-born children — no distinction therefore to be made between persons capable and persons incapable — (all were capable) — no difficulty, consequently, in adjusting the proportions that the capable children were to take, or in determining the manner, or the period, of ascertaining those proportions. I am asked why the existence of incapable children should prevent capable children from taking. But, in *Jee* v. *Audley*, the mere possibility that there might have been incapable children was sufficient to exclude those who were capable. It is said, the devise there was future. Certainly; but only in the same sense in which these bequests are future: that is, so conceived as to let in after-born children; which was the sole reason for its being held to be void. Unless my decision on the first point be erroneous, the bequests in this case do equally include after-born children of the testator's daughters, and are therefore equally void.

The case of *Routledge* v. *Dorril*, 2 Ves. 357, appears to me to be also an express authority on the point now in question. And I think that the circumstance, that there the will was an execution of a power, was rather favorable than adverse to the courts making a distinction between the two sets of grandchildren. For it might have been contended that after-born grandchildren were not proper objects of the power, — that the appointment was therefore void *quoad* them, but good *quoad* those who were capable of taking under the power. Whatever might be the value of that argument, it would have no application to the question now before the court. For in this case it could not be said that any one grandchild was, more or less than another, the proper object of the testator's spontaneous bounty; and therefore we have not the line, which the power might have furnished, for making a distinction between the two classes of grandchildren. If, even in such a case, the distinction could not be made, *a fortiori* is it impossible to make it in this.

The case of *Blandford* v. *Thackerell*, 2 Ves. 238, has no application to the present question. There was no vice or excess in the testator's bequest, which the court had to cure by excluding some of the objects in whose favor it was conceived. It was a sort of charitable intention for the benefit of children and grandchildren of relations of a specified description. As it was not a future bequest, or by way of remainder, it would, according to the established rules of construction, extend only to children and grandchildren living at the testator's death. Lord Rosslyn thought fit, (probably because it was in the nature of a charity,) to

extend it to all the objects to whom the testator might legally have extended it — that is, children or grandchildren born during the lives of the different relations. Whether that was, or was not, a correct execution of the particular will, the case has no bearing at all on the point now under discussion. The case of *Wilkinson* v. *Adam*, 1 V. & B. 422, was referred to, as furnishing an instance of a distinction made between those who were, and those who were not, capable of taking under the same devise. That was merely a question of description, who were or were not included under the denomination of children. If it could be shown that after-born grandchildren are not entitled to the appellation of grandchildren, there would be a short end of the present case. On the whole, my opinion is, that all the bequests to the grandchildren as classes, (for I have nothing to do with the bequests to individuals,) are wholly void.

A question has been made, whether the particular bequests thus declared void do or do not fall into the residue. I have always understood that, with regard to personal estate, everything which is ill given by the will does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue itself be ill given. It is immaterial how it happens that any part of the property is undisposed of, — whether by the death of a legatee, or by the remoteness, and consequent illegality, of the bequest. Either way it is residue, — *i. e.* something upon which no other disposition of the will effectually operates. It may in words have been before given; but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue.

A testator supposes that each part of his will is to take effect, and consequently cannot be said to have any intention to include in his residue anything that he has before given. I do not see, therefore, how such arguments as might be used in cases of the description of *Roe* v. *Avis*, 4 T. R. 605; *Church* v. *Mundy*, 12 Ves. 426; and *Welby* v. *Welby*, 2 V. & B. 187, can be here applicable. The limitations of a particular bequest, and those of the residue, may be quite incongruous; for the testator supposes that each is to have its separate effect. But what eventually turns out to be undisposed of will not the less constitute residue, because some of the provisions contained in the residuary clause may be inapplicable to a case of which the testator did not foresee the existence.

I am of opinion that, in so far as any of the particular bequests are ill disposed of, they fall into the residue. But then, according to what I have already determined, there is no good disposition of the residue itself after the death of the tenants for life, excepting in so far as the ultimate proviso may operate upon the subject of it. As to that proviso, one half of the residue is placed out of the reach of its operation, by Mrs. Mitford's having left children at her death. The consequence is, that, subject to Mr. Mitford's life interest, it belongs to the testator's next of

kin. The fate of the other half rests in contingency. If Mrs. Robinson should die without leaving issue, it is well given over to the children of Mrs. Mitford, there being nothing in this bequest to make it too remote; and it being evident that the testator used the words "*surviving* sister" in the same sense as *other* sister. But if Mrs. Robinson shall leave issue, this half also will, at her death, be undisposed of, and divisible among the next of kin.

The question as to the widow's right to share in the property which turns out to be undisposed of, I take to be settled by the case of *Pickering* v. *Lord Stanford*, 2 Ves. 272, 581; 3 Ves. 332, 492; 4 B. C. C. 214.

PORTER *v.* FOX.

CHANCERY. 1834.

[*Reported* 6 *Sim.* 485.]

WILLIAM PORTER, by his will dated the 3d of April, 1807, gave to trustees, whom he also appointed his executors, all his real and personal estate, upon trust to secure, support and maintain the several contingencies therein mentioned or referred to, with full power to lease all the said estates and to take the rents and profits thereof to maintain the several contingent expenditures thereby bequeathed and appointed, and the surplus thereof to be disposed of in the manner thereby directed, "and to be and remain assets, in their hands, for improvement until the time and times should arrive when distribution should be made as thereby directed:" and he gave to his wife, Elizabeth Porter, for her life, an annuity of £160 to be paid out of his real and personal estates, and, after the decease of his widow, he gave to his son, William Porter, for his life, an annuity of £80: and he directed that, after payment of the annuities, at the expiration of every year or as soon as convenient, such surplus as should happen to arise, annually, from time to time, out of his real and personal estate, should, annually, during the lives of his widow and son, be placed out, by his executors and trustees, in the funds, and the dividends, together with all the preceding dividends that were due and rents that might be collected up to the end of the year, should, annually, be laid out, by his executors, in some such capital stocks in some or one of the public funds, to be and remain assets, for improvement, in the hands of his executors and trustees for the benefit of such surviving child or children as after-mentioned.

And the testator ordered that, at the decease of his widow, all his household furniture, beds, bedding, plate, linen, china and all other furniture and implements of housekeeping, should be sold, and the money arising from such sale to be placed out as aforesaid, to be and

remain assets for improvement as aforesaid; and, at the decease of the longest liver of his widow and son, or as soon as conveniently might be afterwards, he directed his trustees and executors to sell all his real estate, and, with the money arising therefrom, to purchase more stock as aforesaid, as far as it would go, to be and remain assets for improvement in the hands of his executors and trustees "for the benefit of his grandchildren and his nephew, Thomas Owen, and to be distributed in manner and form following, that is to say, as they should become of the age of twenty-five years respectively:" and he directed that his trustees should, as soon as any one of his said grandchildren and nephew should arrive at the age of twenty-five years, transfer so much of the capital stock, so purchased as therein directed, as should amount to an equal part or share according to the number of such children as should be then living; and, as soon as the next surviving child should arrive at the age of twenty-five years, then he directed his executors and trustees to transfer another equal share of such capital stock then remaining, including the improvements, as should amount to an equal share according to the number of the then surviving children that should not before have had his or her preceding portion, and so on to the last; and, as soon as the last should arrive at the age of twenty-five years, he or she should have transferred to him or her the rest and residue of the whole capital stock so remaining, with all interest or dividends due thereon and all profits and accumulations whatsoever thereunto belonging since the last transfer: but, in case the last survivor should die before he or she should arrive at the age of twenty-five years, if he or she should have a child or children, or leave one or more lawfully begotten *in ventre sa mere* and born alive, such child or children should be entitled to his, her or their father's or mother's residue, and the father and mother of such child or children, or his or her lawful representative, should take the dividends or interest of such residue towards his, her or their maintenance and bringing up to maturity or age of twenty-one years; but, for want of such succession in issue at the expiration of one year after the decease of the last-mentioned legatee, such residue should go among the other legatees or their lawful representatives, to be equally divided among them share and share alike.

The testator died on the 8th of April, 1807, leaving Elizabeth Porter his widow, and William Porter his only child and heir-at-law him surviving. William Porter the son had two children born in the testator's lifetime, both of whom died infants and unmarried, one of them in the testator's lifetime, and the other, shortly after his death. The plaintiff, who was the daughter of William Porter the son, was the only other grandchild of the testator. She was born in August, 1808. Thomas Owen was an illegitimate son of the testator's sister: he was born in 1788, and died, intestate, in 1818. The testator's widow died intestate in 1814. The plaintiff's father and mother also died intestate, the former in 1819, and the latter in 1828; and the plaintiff obtained letters of administration to them and to the testator's widow.

The plaintiff, by the original bill, which was filed during her infancy, against her mother (who was then alive), and the executors of the testator, claimed the whole of the testator's real and personal estate and the accumulated rents of his real estate, as the heir and sole next of kin of her father and the testator, subject to such claims as her mother might have thereon.

She afterwards filed a supplemental bill against the Attorney-General, stating that he alleged that, as Thomas Owen was a bastard and lived to attain twenty-five and afterwards died intestate, all his interest in the testator's real and personal estate had become vested in the Crown.

The cause now came on to be heard for further directions.

Mr. Pepys and *Mr. Spence*, for the plaintiff.

The Attorney-General and *Mr. Wray*, for the Crown.

Sir E. Sugden and *Mr. Lynch* appeared for the other defendants.

THE VICE-CHANCELLOR. [SIR LANCELOT SHADWELL.] As it is the wish of the parties that I should give my opinion on this will, I must hold that the trust for the benefit of the testator's nephew and grandchildren is, altogether, void.

The testator, after giving annuities to his wife and son, directs the surplus income of his real and personal estate to be invested annually in the funds, and the dividends to be laid out, in like manner, to be and remain assets for improvement in the hands of his executors and trustees, for the benefit of such surviving child or children as aftermentioned. That is the first sentence in which he alludes to the persons who are ultimately to take; and he alludes to them as a class, without mentioning any child or children of his sister or of his son. Then he directs his trustees and executors, at the decease of his wife, to sell his household furniture, beds, &c., and the money arising therefrom to be placed out as aforesaid, to be and remain assets for improvement as aforesaid; and, at the decease of the survivor of his widow and son, to sell his real estates, and, with the money arising therefrom, to purchase more stock as aforesaid, to be and remain assets for improvement in the hands of his executors and trustees, for the benefit of his grandchildren and his nephew, Thomas Owen. There, it is true, he names one individual, and describes others as if they constituted a class; but he speaks of the same persons as he had previously referred to as a class. Then he says: "And to be distributed in manner and form following, that is to say, as they shall become of the age of twenty-five years respectively: and I do hereby order and direct that my said trustees shall, as soon as any one of them my said grandchildren and nephew shall arrive at the age of twenty-five years, transfer so much of the capital stock, so purchased as herein directed, as shall amount to an equal part or share according to the number of such children as shall be then living." He there uses the word *children* as comprehending the children of his son and also the child of his sister. And then he directs his executors and trustees, as soon as the next

surviving *child* should attain twenty-five, to transfer another equal share of the capital stock, according to the number of the then surviving *children*, and so on to the last; and, as soon as the last should attain twenty-five, that he or she should have transferred to him or her, the residue of the capital stock. He then supposes that the last child might not attain the age of twenty-five years, and he directs that, in that case, the share of that child shall go to his or her children; and, if that child should have no issue, then he gives it to the other legatees, alluding to them as a class. What the testator meant was that the right of each child should depend on there being a class formed, and that the first members of that class who attained twenty-five, should take a share, the amount of which should be determined by the number of individuals then constituting the class. The testator has directed such a distribution to take place, amongst a class of persons, as the law will not allow. If the whole of his intention cannot prevail, effect cannot be given to any part of it. It would be inconsistent with that intention to allow Thomas Owen to take a third share of the fund; for the testator meant each person's share to be determined by the number of the class, consisting of his grandchildren and Thomas Owen, who should be living when the first attained twenty-five.

There are several passages in the judgment in *Leake* v. *Robinson*, 2 Mer. 363, which exactly apply, in spirit, to this will.

Declare that the plaintiff is entitled to the whole fund.[1]

DOE d. EVERS *v.* CHALLIS.

EXCHEQUER CHAMBER AND HOUSE OF LORDS. 1852, 1859.

[*Reported* 18 *Q. B.* 231; 7 *H. L. C.* 531.]

ALDERSON, B.[2] This is a writ of error upon the judgment of the Court of Queen's Bench upon a special verdict.

This was an action of ejectment, brought to recover one-twelfth part of certain property devised by the will of one Thomas Dolley to his daughter Elizabeth. The lessors of the plaintiff were Mary Ann Evers and her husband, she being one of two children of John Dolley, the son of the testator.

The testator had four children, John, Sarah, Ann, and Elizabeth: and, by his will, dated 12th June, 1819, he gave the property (the one-twelfth of which is now in question) to trustees during the life of his

[1] An appeal from this decree, on behalf of the Crown, was heard before Lord Lyndhurst, C. His Lordship directed a case to be made for the opinion of the Court of Common Pleas upon the will. But, before the case was argued, the suit was compromised. — REP.

[2] The judges who sat in the Exchequer Chamber were MAULE, WILLIAMS, and TALFOURD, JJ., and PLATT, B. The case in the Queen's Bench is reported 18 Q. B. 224.

daughter Elizabeth, in trust for her separate use, and, after her decease, he gave the same to such children as she might have, if a son or sons, who should live to the age of twenty-three years, and, if a daughter or daughters, who should live to the age of twenty-one years, their heirs and assigns, as tenants in common. He then provided for the disposition of the property in the event of one or more of the children of Elizabeth dying, leaving others or another surviving. He then proceeded thus: "In case all the children of my said daughter Elizabeth Maria shall die, if a son or sons, under the age of twenty-three years, or, if a daughter, under the age of twenty-one years, *or if she has none*," I give the said property, &c. unto the said trustees, during the respective lives of my son John and my daughters Sarah Ward and Ann Dolley, upon trust for the use of John, and the separate uses of Sarah and Ann, during their lives, in equal shares; "and, upon the decease of my said son and two last-named daughters, I give the share of such of them so dying unto his or her children, if a son or sons, living to attain the age of twenty-three years, and, if a daughter or daughters, living to the age of twenty-one years, his, her and their heirs, executors, administrators and assigns;" if more than one, as tenants in common. "And" (the part of the devise upon which the question depends), "in case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of twenty-three years, or, if a daughter, who shall live to attain the age of twenty-one years, I give the part and parts such children or child would be entitled to as aforesaid unto the child or children of my said son and two daughters having issue, if a son or sons, living to the age of twenty-three years, and, if a daughter or daughters, living to attain the age of twenty-one years; if two of my said last-named children have such children or child, to them, his or her heirs, executors, administrators and assigns, as taking in equal shares from his or her father or mother, his, her and their heirs, executors, administrators and assigns."

Elizabeth died in August 1838, having been married, but never having had a child. Upon her death, her brother and two sisters took each one-third of the property devised to her as above. In March 1847 Ann died, having been married, but also never having had a child. And thereupon Mrs. Evers, being one of two children of John, and being twenty-one years of age, claimed one-twelfth of the property devised to Elizabeth, insisting that, upon the event which had happened, the two children of John became entitled to half of the one-third of the property devised to Elizabeth which had come to Ann upon her death, and that she, as one of them, was entitled to the half of this half, or one-twelfth of the whole.

A special verdict was found, which stated the above facts: and judgment was given by the Court of Queen's Bench for the lessors of the plaintiff. And upon this judgment the present writ of error is brought.

This will came under the consideration of the Court of Queen's Bench in the case of *Doe dem. Dolley* v. *Ward*, 9 A. & E. 582: and both

parties acquiesce, and, as we think, most correctly, in the propriety of that decision.

We are to take it, therefore, as clearly established that by this will the testator gave an estate for life to his daughter Elizabeth, with a contingent remainder in fee to her unborn children, which, on the birth of a child, became a vested remainder in fee; and that, upon such child or children being born, but failing, if male, to attain twenty-three, and, if female, twenty-one, then he gave Elizabeth's share over by an executory devise to his other three children equally. Now it is clear that this executory devise over would be void as too remote. But in this part of his will the testator also provided, by a distinct and separate clause, that, if Elizabeth should have no children, the property devised to her should go over in like manner to his three remaining children. Now in that event (which happened) the contingent remainder to Elizabeth's children never vested; and so the devise over took effect, not as an executory devise, but as a good contingent remainder to the three other children of the testator, one of whom was the testator's daughter Ann.

In the event therefore which has happened, the devise was one to Elizabeth for life, contingent remainder to her unborn issue (which failed), contingent remainder, as to one-third, to Ann for life, with a contingent remainder in fee to Ann's unborn issue, to become vested on the birth of a child, and with the devise over (on which the present question turns) in favor of the children of her surviving brother John and sister Sarah. Now Ann died never having had a child; and, consequently, the contingent remainder in fee given to her children failed.

We must look therefore at the terms of the devise over.

They are as follows: "In case of the death of my said son or either of my said two daughters without leaving a child, if a son, who shall live to attain the age of twenty-three years, or, if a daughter, who shall attain the age of twenty-one years, I give the part and parts *such children or child would be entitled to as aforesaid* unto the child or children of my said son and two daughters *having issue*, if a son or sons, living to the age of twenty-three years, and, if a daughter or daughters, living to attain the age of twenty-one years; if two of my said last-named children have such children or child," &c.

Now here there are not the two events which were separately and distinctly mentioned in the former devise over. The event, if she shall have no children, is not mentioned in terms at all.

The question between the parties is, whether this devise over be void or not. It may be well admitted that the testator intended to include in these words two events: first, the event of Ann having no child at all; for, certainly, if she never had a child, she must die without leaving a son who could attain twenty-three or a daughter who could attain twenty-one; but, secondly, he also intended to include in these same words the compound event of her having a child and that child dying

under the prescribed age. This second event is, according to all the cases, too remote an event to take effect according to law. The first, if it stood alone, is legal. The thing to be settled is the principle upon which the court is to act.

In the first place, it seems established that the time to construe the will is at the testator's death. The devise must be legal at that time, to oust the heir-at-law. Now, at the death of the testator and in the lifetime of Ann, how would this devise have been construed? For it is not sufficient that, on the happening of certain events, the devise may take effect, and, if limited to these events originally, would have been valid: but it ought to be shown that the devise of the testator must be valid and legal in all the events contemplated by him.

This, we think, is the principle contained in the passage of Sir W. Grant's judgment in *Leake* v. *Robinson*, 2 Meriv. 390, in which he says: "Executory devise is itself an infringement on the rules of the common law, and is allowed only on condition of its not exceeding certain established limits." In a devise to a class, therefore, the courts do not split the devise into its parts and give effect to the legal part of it. For this, says Sir W. Grant, is to make a will for the testator. He says: "I give my property to the whole of this class." It may be that the persons to whom he is not permitted by law to give it are the very persons in favor of whom he includes the whole class in his bounty: and therefore, in splitting the devise into its parts, you may perhaps violate his will, even as to those to whom you give it. If he separates the devises himself, it is not so. Here the meaning, and the true meaning, of this clause is, *In every event* which can happen in which Ann dies leaving no child who if male attains twenty-three or if female twenty-one, I give the estate over. That is what he says, and what he means. He includes all these events in one class. Some are legal, some illegal. How is the court to separate these events, which the testator has expressly joined together, without making a will for him?

The principle, therefore, seems to be against splitting such a devise when we are considering the question whether it is a legal one. Now this question, it is conceded, must be determined as on reading the will at the instant of the testator's death. Do the cases cited affect this principle?

On looking at them, we find that in all of them the devise in any event was legal, and that it was competent to the testator to make it. In *Jones* v. *Westcomb*, 1 Eq. Ca. Abr. 245, the case on which the Court of Queen's Bench proceeded, this was so. That was a bequest to the wife for life, and, after her death, to the child with which she was supposed enceinte, and, if such child should die before twenty-one, then, as to one-third, to his wife, and two-thirds to other persons: and it was held, the wife not being enceinte, that the bequest over took effect. But, if the testator had distinctly expressed all that the court held to be included in the words he used, the whole would have been still legal.

This is not an authority, therefore, for splitting a devise and giving effect to the legal, rejecting altogether the illegal part of it. *Gulliver* v. *Wickett*, 1 Wils. 105, which is in truth the same case, only applying the will to real estate, is to the same effect. And the observations of the court in this latter case, as to the validity of the executory devise over, if it took effect as an executory devise, were material if this necessity for the devise being legal in all the contingencies contemplated by the testator be the true principle on which the court acts, and may reconcile the observations of Mr. Fearne (Cont. R. p. 396) with those of Bayley, J., in *Doe dem. Harris* v. *Howell*, 10 B. & C. 191, 200. *Meadows* v. *Parry*, 1 Ves. & B. 124, is to the same effect. These cases are fully explained and put on a very clear principle by Sir W. Grant in *Murray* v. *Jones*, 3 Ves. & B. 319. They show, no doubt, that the existence and failure of the children to whom the provisions limited is made is not in all cases, and was not in these cases, a condition precedent to the devise over. But they show no more, and do not at all apply to the question now before the court, whether, if one of the contingencies be illegal, the single devise which includes that contingency with others becomes void. If Lady Bath had separately stated in her will the two contingencies, in either of which Mrs. Markham was to take, each would have been legal; and the court held that her including them in one expression made no difference. It is like expressing the individuals of a class, all of whom can legally take, and including all those individuals in a class which is good. But the reverse is true if some of the individuals cannot legally take. There, if expressly named, the will is carried partly into effect. If classed, it is void altogether.

Suppose that this had been the limitation in a deed: To Ann for life, remainder to her children in fee, and, if she have none who, if a male, attains twenty-three, or, if a female, attains twenty-one, then over: it is, we apprehend, clear enough that such a limitation over would be void altogether at the common law. It may however, says Mr. Fearne (Cont. R. p. 373), be good in a will, or by way of use, upon a contingency to happen within a reasonable period. Now, if so, must the contingency here so happen? We think not: for it may go beyond the time allowed by law, if the natural and full effect be given to the words of the testator.

For these reasons, we think that the judgment of the Queen's Bench must be reversed.

Judgment reversed.

The case was then brought to the House of Lords.

The judges were summoned, and Mr. Justice Wightman, Mr. Justice Williams, Mr. Baron Martin, Mr. Justice Crompton, Mr. Baron Bramwell, and Mr. Baron Watson attended.

Mr. Malins and *Mr. Greene* (*Mr. Bailey* and *Mr. George Atkinson* were with them), for the plaintiffs in error.

Mr. Rolt and *Mr. George Simpson*, for the defendant in error.

The Lord Chancellor [Lord Chelmsford] moved that the following question be put to the judges: —

Neither of the testator's daughters, Elizabeth Maria and Ann, ever having had any issue, and Ann, the survivor, having died in 1847, does the will contain any valid devise on her death to the children of John and Sarah of the property originally given to Elizabeth Maria and Ann respectively for their lives?

Mr. Justice Wightman. My Lords, for the purpose of considering the question proposed by your Lordships, it will not be necessary to state in detail the terms of the devises and limitations in the will, as they are stated shortly in the case of the defendant in error, and somewhat more at length, but very distinctly and correctly, in the judgment of the Court of Exchequer Chamber.

The question in effect is, whether the Court of Queen's Bench was right in holding that the devise over to the children of John and Sarah took effect as a contingent remainder on the death of Ann without issue, or whether the Court of Exchequer Chamber was right in holding that the devise over to the children of John and Sarah was one indivisible executory devise which could not be split or separated into two parts.

Upon this point the decision of the Court of Exchequer Chamber seems to be mainly founded upon the judgment of Sir William Grant in the case of *Leake* v. *Robinson*, 2 Mer. 363. In that case the limitation over was to the whole of a class, of whom some were capable and others incapable; and it was held by Sir William Grant that such a limitation could not be divided and be good as an executory devise for such as were capable, and bad for those that were incapable. The class was indivisible, except by the testator himself, for if divided after his death it might be that the persons of the class who were by law incapable of taking in remainder were the very persons in favor of whom he included the whole class; and therefore, if the devise were split, the persons who would take might not be those whom it was the intention of the testator to benefit.

But the present case is upon this point clearly distinguishable; and the limitation over seems to be in its nature divisible, the having no child at all being one contingency, and the having a child which, if a son, does not reach the age of twenty-three, or if a female, twenty-one, being the other. In *Doe d. Herbert* v. *Selby*, 2 B. & C. 926, it was held that an estate might be devised over in either of two events, and that in one event the devise may operate as a contingent remainder, and in the other as an executory devise, and the Court of Queen's Bench in the judgment in the present case considers that it was governed by the case of *Doe* v. *Selby*.

It is admitted by the Court of Exchequer Chamber that by the words used by the testator in the limitation over, he intended to include two events, first, the event of Ann never having a child at all, and the compound event of her having a child, and that child dying within the prescribed age. The first event, if it stood alone, was legal. The second

event was too remote to take effect according to law. The Court of Exchequer Chamber, however, was of opinion, that the testator included all these events, some legal, others illegal, in one class, and that the court could not separate them; that the true meaning of the clause was, "in any event which can happen in which Ann dies leaving no child, who, if male, attains twenty-three years, or if female, twenty-one, I give the estate over."

The whole question, therefore, as before observed is, whether the clause for carrying the estate over is divisible or not. If it is, the appellants ought to succeed, if not, the respondents ought to succeed. The terms used in the limitation over include two contingencies; would there have been any real difference if the terms had been to Ann for life, with remainder to her children in fee, and if she has no child, or if she have a child who if a son shall not attain twenty-three years, or if a daughter who shall not attain twenty-one years, then over? In such case it can hardly be doubted but that the estate would be devised over in either of two events, and that in one event the devise over would be good as a remainder, though the second alternative would be objectionable as an executory devise on the ground of remoteness. The Court of Exchequer Chamber remarks that in the case of *Jones* v. *Westcomb*, *Gulliver* v. *Wickett*, and the other cases cited upon the argument, the limitations over, whether divisible or not, were in any event legal, and those cases, therefore, do not affect the question in this, which turns upon the divisibility of the contingencies; and, commenting upon the case of *Murray* v. *Jones*, the court observes, "That if Lady Bath had separately stated in her will the two contingencies in either of which Mrs. Markham was to take, each would have been legal, and her including them in one expression made no difference. It is like expressing the individuals of a class all of whom can legally take, which will be good; but the reverse is the case if some of the individuals cannot legally take." That was the case in *Leake* v. *Robinson*, which is clearly distinguishable from the present, for the reasons already stated; and it may indeed be cited as an authority to show that the limitation over in that case might have been good, if the terms used had been such as to separate such part of the class as could take from such as could not.

No case or authority has been cited to show that where a devise over includes two contingencies which are in their nature divisible, and one of which can operate as a remainder, they may not be divided though included in one expression; and our opinion does not at all conflict with the authority of the cases of *Proctor* v. *The Bishop of Bath and Wells*, 2 H. Bl. 358, and *Jee* v. *Audley*, 1 Cox, C. C. 324, in neither of which cases was it possible for the limitation over to operate as a remainder.

We are therefore of opinion, for the reasons we have given, that the Court of Exchequer Chamber was wrong in holding that the contingencies in the limitation over could not be separated; and as that was the ground of the decision, it is unnecessary to enter into the considera-

tion of various points which were made, and cases which were cited upon the argument before your Lordships, as we think that the devise was divisible, and that the judgment of the Court of Queen's Bench was right, and that the will contained a valid devise on the death of Ann to the children of John and Sarah of the property originally given to Elizabeth Maria and Ann respectively for their lives.

Lord Cranworth. My Lords, in this case I do not propose to trouble your Lordships by going over the facts, or stating the terms of the devise. The will has been so fully considered, that after the unanimous opinion which we have received from the learned judges upon its construction, I think it is unnecessary for me to do more than to state to your Lordships that I concur in the opinion of the judges, and very shortly to state the grounds of that concurrence.

I think that the gift to the children of John and Sarah on the death of Ann without issue in 1847 took effect as a contingent remainder and not as an executory devise, and so was good; because when the particular estate determined, the contingency on which the remainder was to take effect had happened.

On the death of Ann, the testator gives what she had enjoyed for her life to her children, that is, sons at the age of twenty-three and daughters at twenty-one. This devise, according to the decision of the Court of Queen's Bench in *Doe d. Dolley* v. *Ward*, would, if Ann had left any children, have given them a vested estate in fee simple with a subsequent executory devise, or attempted executory devise to the children of John and Sarah in the event of the sons dying under twenty-three. This would have been bad for remoteness. But in the event which happened the gift to the children of Ann never took effect, so that the question as to the remoteneness of the gift over on the death of those children under twenty-three never arose. On the death of Ann, the contingency on which one sixth of the shares of Elizabeth and Ann was given to the children of John had happened, for Ann had then died without any child who could attain the age of twenty-three years; and there is no rule which could prevent the estate from then vesting in those to whom it was given on a contingency which happened at the instant when the particular estate determined.

The case is not distinguishable in principle from *Gulliver* v. *Wickett*. There, it is true, the devise over, if there had been a child, was on an event not too remote, and which, therefore, might have taken effect. In that respect it differs from the present case; but the court held that the devise in the event which did happen, of there being no child, took effect, not as an executory devise, but as a contingent remainder. I state that, although I know that a very high authority, Mr. Fearne (Cont. Rem. 9th ed. 396), says the contrary; but looking at the case, I can come to no other conclusion. The note of the reporter, at page 106, appears to me to show that he did not fully appreciate the force of Chief Justice Lee's language, which seems to have been studiously framed with the view of showing that in one event, that which did not happen, namely,

the event of there having been a child, the gift over must have taken effect (if at all) as an executory devise, but in the event which did happen, namely, there being no child, the gift took effect as a remainder. The language is this; after stating the case, he says, taking the proviso to be a limitation, and not a condition precedent, these cases amount to a full answer (the cases he had referred to), and therefore we are all of opinion, "That the true construction of this will is, that here is a good devise to the wife for life, with remainder to the child, in contingency in fee, with a devise over, which we hold a good executory devise, as it is to commence within twenty-one years after a life in being, and if the contingency of a child never happened, then the last remainder to take effect upon the death of the wife; and the number of contingencies is not material, if they are all to happen within a life in being or a reasonable time afterwards."

Now, I am aware that Mr. Fearne treats the gift as an executory devise, and not as a remainder. But this is directly at variance with the language of the court (which I have just read), and as I think with the well-understood distinctions between executory devises and contingent remainders. If the language of the gift over had been that, "In case of the death of my said son, or either of my said two daughters without leaving a child who shall attain the age of twenty-three years or without ever having had a child, then I give the share of such son or daughter unto the children," &c.; surely, on the happening of the latter alternative, namely, the death of one of the daughters without ever having had a child, the children taking under the gift over, would have taken a remainder. They would have taken an estate expressly given to them on the determination of the preceding life estate, given to them, it is true, on a contingency which, according to the hypothesis, would have happened at the instant when the particular estate came to an end. I can see no distinction, when we are only construing the language of the will, between the case where the contingency of dying without having had a child is, as I have suggested, expressed, and where it is implied, as it is in the present case. There is a contingent remainder in fee to the child of the tenant for life if she had had one; if she had none then there is a gift to others in fee; the contingency must be determined at her death; and whether the result should be to give the estate to her own child, or to the children of her brother and sister, in either case the gift must take effect as a remainder, for no prior estate is divested or displaced.

It is true that if the former alternative had happened, that is, if the daughter, tenant for life, had left a child, then there was a gift over on the death of that child, which was void for remoteness. That gift over could only take effect, if at all, as an executory devise; for it would be a gift over divesting the fee simple given to the child of the tenant for life. But I see no reason for holding that because in one alternative the gift must have operated as an executory devise, therefore it must do so in the other. In the case which has happened there is a gift to

the children of the surviving son and daughter taking effect immediately on the termination of the preceding life estate, and which therefore is unobjectionable.

I therefore entirely concur in the unanimous opinion of the judges, that the judgment of the Exchequer Chamber reversing that of the Queen's Bench was wrong.

Lord Wensleydale. My Lords, I entirely agree with the learned judges in the answer which they have given unanimously to the question which your Lordships proposed to them, and in the advice given by my noble and learned friend who has preceded me.

The facts of the case upon which the question arises are very succinctly and distinctly stated in the judgment of the Court of Exchequer Chamber delivered by the late lamented Baron Alderson, and no fault can be found with any part of it prior to that relating to the clause which the judges in the Court of Exchequer Chamber held that they could not construe divisibly; nor can any objection be made to the principles of construction which the court laid down, except as to that particular clause.

The court held it to be clearly established that the testator gave an estate for life to his daughter Elizabeth Maria, with a contingent remainder in fee to her unborn children, which became vested on the birth of a child, and that upon such child or children being born, but failing, if a male, to attain twenty-three, and, if a female, twenty-one, then he gave Elizabeth Maria's share by executory devise to his three other children equally. That executory devise was too remote. But he also provided by a distinct clause that if Elizabeth Maria had no child the property should go over in like manner to his three other children; and that event having happened, the devise over took effect, not as an executory devise, but as a good contingent remainder to his three other children, one of whom was Ann. She died, never having had a child, and the contingent remainder in fee to her children failed. And the question arises on the terms of the devise over, in which the court observes there are not the two events which are separately and distinctly mentioned in the former devise. The devise over, if she shall have no children, is not mentioned in terms at all.

The court admitted that the testator intended to include in the words of the clause the double events, first of Ann having no child at all (for, certainly, if she never had a child, she must die without leaving a son or daughter who should attain the required age), and, secondly, the compound event of her having a child, and that child dying under the prescribed age. But the court did not feel itself at liberty, in the case of an executory devise, so to construe the clause, but acted on the principle that a devise to a class, as Sir William Grant held in the case of *Leake* v. *Robinson*, could not be split.

In concurrence with the opinion we have received from the learned judges, I think this is a mistake. The gift to a class is a gift to a body of persons, uncertain in number at the time of the gift, but to be ascer-

tained at a future time, and who are all to take equally, the share of each depending, as to amount, upon the ultimate number of persons (see 1 Jarman on Wills, 287–295), and that ultimate number is incapable of being ascertained within legal limits. Such a devise as this, Sir William Grant held he could not split into portions, for that would be to make a new will. But that doctrine is entirely inapplicable to this case. There is nothing to prevent the construing of the clause in the first instance, and ascertaining its proper meaning, though it be an executory devise, and having ascertained its meaning, to apply the rules of law to it. So doing in this case, there cannot be a doubt that the meaning of the clause is what the Court of Queen's Bench suggests it to be, and its legal effect is precisely the same as if the testator had provided, in express words, for the event of Ann having no children, as he had done in the former clause as to Elizabeth having none. So reading this clause, there is no doubt that in the event which happened of Ann having no children, the gift over took effect by way of contingent remainder.

Lord Chelmsford. My Lords, the question in this case is, whether the devise over in case of the testator's daughter Ann dying without issue, or in case of all the children which she might have dying, if a son, under the age of twenty-three years, or if a daughter, under the age of twenty-one years, will embrace the case, which is not expressly mentioned, of the daughter Ann never having a child at all; and if so, whether the devise over is good in that event, or whether it must not all be taken together, and the part with respect to the sons dying under the age of twenty-three being too remote an event to take effect according to law, the whole devise must not be held to be void.

Both the Court of Queen's Bench and the Court of Exchequer Chamber consider that the devise in question included the case of the daughter Ann having no child; Mr. Baron Alderson, who delivered the opinion of the Court of Error, saying: "It may be well admitted that the testator intended to include in the words two events: first, the event of Ann having no child at all, for certainly, if she never had a child, she must die without leaving a son who could attain twenty-three, or a daughter who could attain twenty-one; but secondly, he also intended to include in the same words the compound event of her having a child, and that child dying under the prescribed age." But the Court of Queen's Bench held that the limitation might operate as a contingent remainder, in the event of Ann having no child, which would of course take effect, if at all, upon the determination of her life estate, although, if she had died leaving children, the limitation would have been void, as it would then only take effect as an executory devise, and would be bad as being too remote. The judges in the Court of Exchequer Chamber, on the contrary, held that, although the limitation included the event of Ann's having no child, which would of course, if it had stood alone, be a perfectly valid bequest, to take effect on Ann's death, yet that being entire and indivisible, and part of it depending upon an

event too remote to take effect according to law, it was altogether void. The ground upon which they proceeded was, that a devise upon different contingencies can only be split into its parts, and effect given to one part of it, where all the contingencies contemplated by the testator are legal, and for this reason they distinguished the case of *Jones* v. *Westcomb* upon which the Court of Queen's Bench proceeded, and the case of *Gulliver* v. *Wickett,* which was upon the same will, from the present case. But it appears to me that the distinction is not to be supported either upon principle or by authority. It is conceded by the Court of Error that the limitation in question involves a contingency with a double aspect, depending upon events which are distinct and separate from each other. The alternative contingencies must therefore be taken as if they had been separately and distinctly expressed. Why then should the words of contingency, on which the void estate was intended to be limited, affect the valid estate to which they do not apply? And can there be any difference in principle between cases where the alternative limitations, though distinct and separate in their nature, are both involved in words which apply equally to and include within them both the limitations, and those where each of the limitations is separately expressed by its appropriate description? If this is so, the opinion of the Court of Exchequer Chamber is opposed to the authority of the cases of *Leake* v. *Robinson, Goring* v. *Howard,* 16 Sim. 325, and other cases which relate to personal property, and *Monypenny* v. *Dering,* 2 De G. M. & G. 145, which is a case of real property. The case of *Proctor* v. *The Bishop of Bath and Wells* was pressed upon your Lordships as a conclusive authority in favor of the defendant; but it appears to me to afford him no assistance. In that case there was no possibility of the limitation ever taking effect independently of the first devise. It was limited upon the event of Thomas Proctor having no son capable of entering into holy orders. This must necessarily have been contingent during the life of Thomas Proctor, the devise over was wholly dependent upon it, and as the court said, "The words of the will could not admit of the contingency being divided." If the devise over had been in case Thomas Proctor should have no such son at the death of the testator, it would have been more like the present case, and would have exactly resembled *Monypenny* v. *Dering,* and there would have been no doubt, notwithstanding the invalidity of the devise to the son of Thomas Proctor, that the alternative limitation would have been good.

I therefore concur in the opinion which has been expressed by my noble and learned friends, that the judgment of the Court of Queen's Bench was correct, and that the judgment of the Court of Exchequer Chamber reversing that judgment was erroneous, and ought to be reversed.

Lord Brougham. My Lords, I entirely agree with all my three noble and learned friends who have addressed your Lordships, and with the learned judges who, after full consideration, have given a clear

and unanimous opinion upon the subject. As to the cases, of which there are several, I need not go into them. One of them is *Proctor* v. *The Bishop of Bath and Wells*. In that case there was no particular estate to support the contingent remainder, and it was clearly an executory devise. There were also several other cases which I need not go into, as my noble and learned friends have referred to them. I therefore move your Lordships to pronounce judgment for the plaintiff in error, reversing the judgment of the Court of Exchequer Chamber, and setting up the judgment of the Court of Queen's Bench.

Judgment of the Court of Exchequer Chamber reversed, and judgment given for the plaintiff in error.

STORRS *v.* BENBOW.

CHANCERY. 1853.

[*Reported* 3 *De G. M. & G.* 390.]

THE LORD CHANCELLOR.[1] [LORD CRANWORTH.] I was perfectly prepared to dispose of this case three months ago, but was told that the point was very much the same as that raised in *Gooch* v. *Gooch*, 3 De G. M. & G. 366, and that the parties therefore wished the matter to stand over until that case was disposed of, thinking it might have a material bearing upon the present question. I confess, however, that this appears to me to be a perfectly clear case, and to be independent of any decision in *Gooch* v. *Gooch*.

The question arises upon a clause in a codicil which is in these words: "*Item*. I direct my executors to pay by and out of my personal estate exclusively the sum of £500 apiece to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years without benefit of survivorship." This is a money legacy to each child of any nephew the testator had or might have. The testator had brothers living; but there might be legacies too remote, because the gift included legacies to children of a child not yet born.

The bill was filed twenty or thirty years ago; and the cause was heard before Sir John Leach. The argument then was, that the gift was too remote; but Sir John Leach thought that, according to the true construction of the clause, children born in the lifetime of the testator were meant, and therefore he said the gift could not be too remote, for it only let in children that might be born between the date of the will and the death. A decree was accordingly made declaring that the children *in esse* only at the time of the death of the testator

[1] The opinion only is here given.

were entitled to the legacies, and it was referred to the master to inquire, &c. The master found that the plaintiff was *in esse* in this sense; namely, that the testator died in October and the plaintiff was born six months afterwards; and I think he was so. The question then is whether he is entitled; I am of opinion that he certainly is; for he was a child *in esse* within the meaning put upon the clause by Sir John Leach.

There are three ways in which this gift might be interpreted: it might mean children that were *in esse* at the date of the will; it might mean children that might come into *esse* in the lifetime of the testator; and it might mean children born at any time. I own it seems to me that this gentleman is entitled *quacunque via*. If it was to the children then in being, he would, I think, be probably within the meaning of such description; but if it was to children to come *in esse* in his lifetime and afterwards to be born, it seems to me that a child *in ventre sa mere* at the death of the testator was a child "hereafter to be born" within the meaning of the provision.

The rule that makes a limitation of this kind mean children at the death of the testator is one of convenience: a line must be drawn somewhere, otherwise the distribution of the testator's estate would be stopped, and executors would not know how to act; but that rule of convenience cannot be applied to exclude a child certainly within the meaning of the limitation, in the absence of any contrary expressed intention of the testator. I think therefore that Sir John Leach was right, supposing the interpretation of the will to be what I have stated, and that this child certainly comes within the description. I must add, however, that I do not say that the gift was at all remote if it meant a child to be born at any time, because this is not the case of a class; it is a gift of a pecuniary legacy of a particular amount to every child of every nephew which the testator then had, or of every nephew that might be born after his death, and is therefore good as to the children of the nephews he then had, and bad as to the children of nephews to be born after his death.

It would be a mistake to compare this with *Leake* v. *Robinson*, 2 Mer. 363, and other cases where the parties take as a class; for the difficulty which there arises as to giving it to some and not giving it to others does not apply here. The question of whether or not the children of after-born nephews shall or shall not take, has no bearing at all upon the question of whether the child of an existing nephew takes; the legacy given to him cannot be bad because there is a legacy given under a similar description to a person who would not be able to take because the gift would be too remote. I give therefore no positive opinion upon the point of remoteness generally in this case, because I think that *quacunque via*, on the construction of the will, there is nothing to justify the exclusion from taking of a child who was conceived at the death of the testator and born six or seven months afterwards. If the words in question meant children who though not then in exis-

tence should be in existence at the death, the plaintiff was in existence at the death; and if they mean children born at any time, he was born and must have been born if at all within such a time as made his legacy not remote. I am therefore of opinion that in any way he is entitled.

Mr. Willcock and *Mr. Rogers*, supported the decree of Sir J. Leach.

Mr. Teed and *Mr. Shebbeare*, for the appellants.

CATTLIN *v.* BROWN.

CHANCERY. 1853.

[*Reported* 11 *Hare*, 372.]

THE question arose upon a devise by Frances Bannister, who died in 1805, to Thomas Bannister Cattlin for life, with remainder to all and every the child and children of the said Thomas Bannister Cattlin, during their natural lives, in equal shares if more than one; and after the decease of any or either of such child or children, then the part or share of him, her, or them so dying unto his, her, or their child or children lawfully begotten or to be begotten, and to his, her, or their heirs forever, as tenants in common.

The testator died in January, 1805.

Thomas Bannister Cattlin had issue five children; namely, George, Emma, Cecilia, Caroline, and Clement, who were born in the lifetime, and were living at the death of the testator; and one child named Judee, who became the wife of Adam Brown, and went to India in 1828, and it is presumed died on her passage or immediately after her arrival, as she was not afterwards heard of, and who left issue several children, some of whom survived Thomas Bannister Cattlin the tenant for life. Caroline, one of the children, who survived the testator, had also issue several children. Thomas Bannister Cattlin also had other issue, ten children, Thomas Magnus, Charlotte, Frederick William, Eliza, Frederick Fisher, William, Emily, Clarissa, Mary, and Susannah, born after the decease of the testator. Of these, two, Frederick William and Eliza, died in his lifetime without having had any issue. Several of the other children who were born after the death of the testator had issue.

The devised estate was subject to a mortgage created by the testator for securing the payment of £2000 and interest; and under the decree of the court, made in 1843, the same estates were conveyed in fee by way of mortgage to secure £2574 and interest, which was raised to pay the debts of the testator.

Mr. Willcock and *Mr. Prendergast*, for the plaintiffs.

Mr. C. P. Cooper, *Mr. Rolt*, *Mr. J. Baily*, *Mr. Rogers*, *Mr. Elderton*, *Mr. Terrell*, and *Mr. Waller* for the other parties.

The authorities referred to are mentioned in the judgment, with the exception of *Griffith* v. *Pownall*, 13 Sim. 393, which is to the same effect as the cases referred to in the fifth rule. (*Infra*, page 654.)

VICE-CHANCELLOR. [SIR WILLIAM PAGE WOOD.] The point in this case is one of some novelty, and I therefore propose to state somewhat fully the reasons that have led me to the conclusion to which I have come.

The question arises on a short devise to Thomas Bannister Cattlin for life, and after his decease to all and every his children or child, for their lives, in equal shares, and after the decease of any or either of them, the part or share of the child so dying unto his, her, or their children or child, and his, her, or their heirs forever, as tenants in common.

There were some children of Thomas Bannister Cattlin *in esse* at the death of the testator, and others who were subsequently born; and the question which has been argued is, whether the remainder in fee to any of the grandchildren could take effect, it being admitted that the remainder in fee to the children of those children of Thomas Bannister Cattlin who were born after the death of the testator cannot take effect.

The first observation that arises in this case is, that the limitations are none of them by way of executory devise, but are limitations of contingent remainders. I apprehend, however, that a contingent remainder cannot be limited as depending on the termination of a particular estate, whose determination will not necessarily take place within the period allowed by law. It has been sometimes a question whether a limitation over beyond the period might or might not be supported as a good contingent remainder, on the ground of its destructibility in the lifetime of the tenant for life. Mr. Jarman in his learned work discusses the point, and observes, "the same species of reasoning, by which a remainder or an executory limitation, to arise on the determination of an estate tail, is supported, might seem to apply to a contingent remainder, which is liable to be destroyed by the act of the owner of the preceding estate of freehold, no estate being interposed for its preservation; but the writer is not aware of any authority for the application of the doctrine to such cases. If, therefore, freehold lands, of which the legal inheritance is in the testator, be devised to A. for life, with remainder to his eldest son who should be living at his decease for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease; although A. in his lifetime might destroy all the remainders, and the eldest son after his (A.'s) decease might destroy the ultimate remainder in fee devised to his children, without being amenable either at law or in equity to the persons whose estates are thus destroyed, such ultimate remainder would, nevertheless, it is conceived, be void for remoteness, on the ground that the destruction in these cases is effected by what the law calls a tortious or wrongful act (though it is a wrong without a remedy), the perpetration of which is not to be presumed." 1 Jarm. Wills, 226.

The latter observation applies very strongly to this case, for here the legal estate is outstanding and subject to a mortgage, and the party in whom such legal estate is vested would be, in effect, a trustee to support the contingent remainder, the destruction of which, under such circumstances, could only be effected by an act which would be doubly tortious. The rule is stated in the able argument of Mr. Preston, in *Mogg* v. *Mogg*, 1 Mer. 654. He says, "A gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of the time within which it is to take effect." Id. 664. That is, I think, a perfectly accurate statement of the law which I am to apply to this case.

I am bound, however, in this case, to look at the whole question, and to consider how it would stand on the doctrine which has been established with regard to gifts by way of executory devise.

The first rule is, that an executory devise is bad unless it be clear, at the death of the testator, that it must of necessity vest in some one, if at all, within a life in being and twenty-one years afterwards. This principle will be found expressly stated in the opinion delivered by the present Lord Chancellor, when advising the House of Lords in the case of *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 546, 570.

The second rule is, that you must ascertain the objects of the testator's bounty, by construing his will without any reference to the rules of law which prohibit remote limitations; and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained.

Thirdly, if the devise be to a single person answering a given description at a time beyond the limits allowed by law, or to a series of single individuals answering a given description, and any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others. One of the earliest cases affirming this rule is that of *Proctor* v. *The Bishop of Bath and Wells*, 2 Hen. Bl. 358. The devise in that case was of an advowson, in fee, to the first or other son of Thomas Proctor, the grandson of the testatrix, that should be bred a clergyman and be in holy orders; but in case he should have no such son, then to another grandson of the testatrix in fee: and it was held that the first devise was void as depending on too remote a contingency; and that the latter limitation, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided. In the recent case of *Lord Dungannon* v. *Smith*, 12 Cl. & Fin. 546, it was sought, in support of the bequest, to show that one of the series of persons who might be the heirs male of the body of the grandson, might take within the prescribed period, and was not therefore within the objection; but the answer was, that

"there was no gift to him in terms different from the gift to all others who may be able to bring themselves within the terms of the gift," and that "where a testator has made a general bequest, embracing a great number of possible objects, there is no authority for holding that a court can so mould it as to say that it is divisible into two classes, the one embracing the lawful, the other the unlawful objects of his bounty." 12 Cl. & Fin. 574.

The fourth rule is, that where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule, and for the same reason. You cannot give the whole property to those who are in fact ascertained within the period, and might have taken if the gift had been to them *nominatim*, because they were intended to take in shares to be regulated in amount, augmented or diminished, according to the number of the other members of the class, and not to take exclusively of those other members. Of this rule the cases of *Jee* v. *Audley*, 1 Cox, 324, *Leake* v. *Robinson*, 2 Mer. 363, and *Gooch* v. *Gooch*, 14 Beav. 565, are illustrations. *Jee* v. *Audley* was a strong case of that class, for there all the children actually *in esse* might have taken, and it was only the possibility that there might have been incapable children, which excluded those who were capable.

The fifth and last rule to which I need to advert, is this, — that where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law. This was settled in the case of *Storrs* v. *Benbow*, 2 Myl. & K. 46. That was a gift of £500 apiece to each child that might be born to either of the children of the testator's brothers, without benefit of survivorship. The legacy of £500 to each of the children living at the death of the testator, who alone could take, was unaffected by the number of subsequently born children, who were excluded; and the exclusion of the latter did not therefore affect the children who were capable of taking under the bequest. The last rule, in fact, amounts to no more than this, — that the gift being single to each party, you have only to consider whether that particular gift must of necessity vest, if at all (according to the first rule), within the limit allowed by law.

Let us now consider the facts of the present case, and apply the rules which have been stated to those facts; and inquire whether the gift be or be not to a number of persons in shares, which, being distinctly ascertained and settled, are incapable of augmentation or diminution. And here I would observe, that it at first appeared to me that there was no distinction between the present case and the late case of *Greenwood* v. *Roberts*, 15 Beav. 92, where there was a gift of an annuity to the testator's brother, and, after the decease of the annuitant, to and amongst

such of his children as might be then living, in equal shares during their lives, with a provision that at the decease of any of them, so much capital as had been adequate to the payment of the annuity to which the child so dying had been entitled during his or her life, should be forthwith converted into money, and divided equally amongst the children of him or her so dying, as and when they should severally attain the age of twenty-one years; and he gave them vested interests therein, and directed, that if any children of his brother should at his decease be dead, and had left issue, such issue should have the share the parent would have had if he had outlived the brother. If the circumstances of that case had not in fact been distinguishable, I should have been under the necessity of differing from it; but in that case the children of the brother, who were born and *in esse* at the death of the testator, might all have been dead at the death of the brother. The case therefore fell within the third and fourth rules which I have mentioned. It was a gift to a class to be ascertained at a time beyond the limits of remoteness, and all the members of the class might be persons without these limits. The children born at the testator's death might take no interest whatever. On this ground the decision in *Greenwood* v. *Roberts* was, no doubt, perfectly right.

The testator devises the estate to Thomas Bannister Cattlin for life, with remainder to all his children as tenants in common for life, with remainder as to every share of every child to the children of that child in fee. Now, to follow the respective shares of the property, suppose Thomas Bannister Cattlin to have four sons, A., B., C., and D., and A. and B. to be living at the testator's death and the others to be born afterwards. A. and B., on the testator's death, take an immediate vested interest in remainder for life, expectant on their father's death, with remainder to their respective children in fee, subject to their respective moieties being diminished on the birth of C. and D., but their exact shares are ascertained within the legal limits at the death of their father, and neither their life interests nor the remainder in fee are capable of being wholly divested in favor of any party beyond the legal limits, neither could any one intended by the testator to take an interest, but at a period beyond the legal limits, possibly take in lieu of A. or B.; their shares are not therefore within the third rule, or governed by the judgment in the case of *Lord Dungannon* v. *Smith*, as might have been the case if the devise had been to the sons of Thomas Bannister Cattlin living at his decease, with remainder to their sons in fee, for then there might possibly, at the death of Thomas Bannister Cattlin, have been no son who was in existence at the testator's death. Neither, again, can any possible event happening after the death of Thomas Bannister Cattlin, augment or diminish the share of A. or B. Here, then, A. and B. are respectively persons *in esse* at the death of the testator, who are to take a share that must be ascertained in a manner incapable of augmentation or diminution at the expiration of another life *in esse*. What is there to prevent the limitation of that share to him for life,

with remainder to his children in fee? for this share must of necessity vest, if at all, within the legal limits, and complies, therefore, with the rule. It is in reality the case of *Storrs* v. *Benbow*, substituting a given share for a given sum of money.

The two shares of A. and B., in the case I have supposed, are wholly free from the questions which arose in *Leake* v. *Robinson*, or *Lord Dungannon* v. *Smith*. Sir William Grant, in *Leake* v. *Robinson*, speaking of the bequest made by the testator in that case, says: "He supposed that he could do all that he has done, — that is, include after-born children, and also postpone the vesting until twenty-five. But if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born grandchildren, rather than abridge the period of vesting? I should think quite the contrary" (2 Mer. 388).

The present case is free from the difficulty which is pointed out in those remarks, and upon which the point in that case was determined. The case of *Dodd* v. *Wake*, 8 Sim. 615, which was mentioned, comes within the same category as *Greenwood* v. *Roberts*. In *Dodd* v. *Wake*, the bequest of a sum of money was limited unto and amongst the children of the testator's daughter, who should be living at the time the eldest should live to attain the age of twenty-four years, and the issue of such of the children of his said daughter as might then happen to be dead leaving issue, to be equally divided between or among them, share and share alike, as tenants in common. There were three children living at the death of the testator, who might have attained the age of twenty-four within the proper period, — but upon that form of bequest it seems clear, as the Vice-Chancellor held, that the testator did not intend it to apply of necessity to any existing child, but to take effect only when the first child attained twenty-four, which might possibly be without the period of legal limitation. The children living on that event might or might not be composed of a class not in existence at the death of the testator.

In the case now before me, no person out of the prescribed limits could possibly take the whole of A. or B.'s share, and the exact amount of each share is finally ascertained within the legal limits; and from the time that it is so ascertained, no party without the legal period can possibly acquire the least interest in it, so as to divest or diminish it; nor can any party whose interest is so ascertained within the period, or his children, acquire any interest in the shares of such other parties so as to augment it.

The limitation as to the shares of C. and D. in the case I have supposed would be clearly void, as their children might be born at a period exceeding the limits which the law allows, they themselves not being *in esse* at the death of the testator. I observe that Mr. Jarman expresses a doubt whether the state of events should not be considered as they stood at the date of the will (1 Jarm. Wills, 229 n. *s*). It is now clear that the death of the testator is the time to be looked at.

The rule on this point is plainly expressed by the present Lord Chancellor [Lord Cranworth] in the case of *Lord Dungannon* v. *Smith*, where, observing that a gift to the person who at the death of B. should be the heir male of his body, if he should attain twenty-one, would be good as to the person who should be heir male of B. at his death, he adds: "It would be good, because at the death of the testator it would be absolutely certain that the bequest must take effect, if at all, within twenty-one years after the death of B.; and it would not be rendered invalid by a subsequent gift to others, which might be too remote" (12 Cl. & Fin. 574).

The declaration will be, that the estate was by the will of the testator well limited in fee to the children of those children of Thomas Bannister Cattlin who were living at the death of the testator.[1]

WAINMAN *v.* FIELD.

CHANCERY. 1854.

[*Reported Kay*, 507.]

THE will of William Wainman, dated the 24th of March, 1814, commenced as follows: "First, I give and bequeath unto Joshua Field, of Austhorpe Lodge, Esq., Walker Skirrow, of Lincoln's Inn, Esq., and Charles Horsfall Bill, of Easthorpe, in the county of York, Esq., my executors and trustees hereinafter named, their executors, administrators, and assigns, all my ready moneys, securities for money, goods, chattels, and personal estate whatsoever (except such goods, chattels, and effects as are hereinafter particularly or especially given, bequeathed, or disposed of; *and also except such leasehold estates as I shall be possessed of or entitled to at my decease; which leasehold estates I hereby declare it to be my intention to exonerate from the payment of my debts and legacies*), upon trust, in the first place to pay the same for and towards the payment of all the just debts which I shall owe at the time of my death, my funeral expenses, and the expenses of proving and registering this my will, and the several legacies hereby given and bequeathed, and such other legacies as I shall by any codicil or writing under my hand hereafter give, bequeath, and dispose of; *and in case there shall be any residue* of my said personal estate (*except as aforesaid*) beyond what shall be sufficient for the payment of my said debts and legacies, *I give and bequeath the same to my son Richard Bradley Wainman, his executors, administrators and assigns.*" And after giving certain hereditaments and personal effects specifically, the testator devised all his real estates, except his leaseholds for years, to the said trustees and their heirs, in trust for the testator's son Richard Bradley Wainman and his assigns, during his life, without impeachment

[1] See *Hills* v. *Simonds*, 125 Mass. 536 (1878), *accord*.

of waste, excepting voluntary waste in pulling down houses or buildings, or cutting down or destroying ornamental trees; and from and immediately after the determination of that estate, to the use of the testator's grandson William Bradley Wainman and his assigns, during his life, without impeachment of waste, except as aforesaid; with remainder to trustees to preserve contingent remainders, with remainder to the use of his first and other sons successively in tail male, with remainder to the use of the second and other sons of the body of the said Richard Bradley Wainman, successively in tail mail, with divers remainders over in tail, with an ultimate limitation to the testator's right heirs. "And I give, devise, and bequeath all and every my leasehold messuages, lands, and tenements, together with my third part or share of the rectory and tithes of Kildwick parish aforesaid, held under the Dean and Chapter of the cathedral church of Christ in Oxford, unto the said Joshua Field, Walker Skirrow, and Charles Horsfall Bill, their executors, administrators, and assigns, *in trust to permit the clear rents, issues, and profits of the said leasehold premises and tithes to be received, taken, and enjoyed by and for the use and benefit of such person or persons as shall for the time being be entitled to my said freehold manors, messuages, lands, and tenements, until the person so entitled for the time being shall, by good assurance, become seised of the said freehold premises in fee simple in possession; and immediately after that shall happen, then in trust to convey, assign, transfer, and assure the said leasehold messuages, lands, tenements, and tithes, with their appurtenances, unto such person who shall become so seised as aforesaid, his, her, or their executors, administrators, and assigns*, by such deeds, writings, instruments, and assurances, as by such person shall be reasonably required, and at his or her costs and charges." And the testator directed that his trustees should in the first place, and in preference to all payments thereinbefore directed to be made by them out of the rents and profits of his real estates, apply a sufficient part of the rents and profits of his real estates in paying all the annual rents, taxes, fines of renewal, and other necessary outgoings, as the same should from time to time become due, to the Dean and Chapter of the cathedral church of Christ in Oxford, on account of his third part of the lease of the rectory and tithes of the parish of Kildwick; and he thereby appointed the said Joshua Field, Walker Skirrow, and Charles Horsfall Bill his executors.

The testator died on the 5th of April, 1818; Richard Bradley Wainmain then entered into possession of the said estates, and died in September, 1842, leaving the plaintiff William Bradley Wainman, who was his only child, and general legatee and devisee and sole executor, surviving him; and the said plaintiff thereupon entered into possession of the freehold and leasehold estates of the testator, as the second tenant for life under the will; and he now filed the bill in this suit against the trustees and other parties interested, praying, that it might be declared that he was absolutely entitled to the leasehold estates for

years of the testator; and that the same might be assigned to him, and that the executors might also be ordered to assign to him the testator's residuary personal estate.

Mr Rolt, Q. C., and *Mr. J. T. Humphry*, for the plaintiff.

The Solicitor-General (*Sir R. Bethell*) and *Mr. Kinglake*, for the next of kin.

Mr. W. M. James, Q. C., *Mr. Cairns*, *Mr. Daniels*, Q. C., *Mr. Bird*, and *Mr. Hardy*, for other parties.

Vice-Chancellor Sir W. Page Wood. The only point in this case which, from the first, appeared to me to raise any question, was that which was involved in the decision in *Evans* v *Jones*, 2 Coll. C. C. 516. But I do not think that case can have any application to the present. The Lord Justice Knight Bruce (then Vice-Chancellor) there held, that there being a gift of the whole of a testator's personal estate except certain stock, and a subsequent gift of that stock, which did not exhaust all the interest therein, to other parties, the intention of the exception was clearly upon the whole instrument not to diminish the general gift of the personal estate, but to give the stock to those particular legatees; and that there was no difference between saying, "I give the stock to A. B. and the residue to C. D.;" and "I give all my personal estate to C. D. except the stock, which I give to A. B." I do not know any other case in which such a gift has been so construed; but the ground of this particular decision is clear. The gift, being by way of exception, the testator first dealing with the whole personal estate with this exception, implied no more than a gift of the whole residue except what was otherwise bequeathed. The rule must therefore be to ascertain in such cases whether or not the exception is merely for the purpose of making the particular bequest. In this case it cannot be for the sole purpose of devising the leaseholds to other persons: it is also expressly to prevent the trustees taking them upon the trusts of the will; and it is analogous to the case of *Attorney-General* v. *Johnstone*, Amb. 577, where it was held, that the testator had clearly expressed an intention that the residue was not to include lapsed legacies. Here the intention is also clearly expressed. The trustees are to take the residue for the purpose of paying the testator's debts out of it, and to hand over any balance after payment of those debts to Richard Bradley Wainman. The testator excepts the leaseholds, for the reason, that he wishes to exonerate them from the payment of his debts and legacies, and not for the purpose of making the particular bequest of them; and if I were to hold the contrary, I must decide that the bequest, having failed by reason of remoteness, the leasehold estate must be brought back into the trusts of the residue, of which the first is to pay the debts and legacies, — whereas, the testator has said in the preceding clause, that it is to be exonerated from the payment of those debts and legacies. He could not by law absolutely exonerate them; but he meant that what was put into the hands of the executors was to be a fund for payment of debts and legacies in preference to any other. The only interest

which Richard Bradley Wainman takes is through the medium of the trustees, after satisfaction of that trust. The gift is to trustees of all the residue, except the leaseholds, for payment of debts and legacies; and if there be anything remaining, the testator gives it to Richard Bradley Wainman; and therefore he can only take through the medium of the execution of a trust, from which this property was excepted. I think, therefore, that the learned judge who decided *Evans* v. *Jones*, looking through the whole will for the intention, would have held that the intention of this will was to except this particular property out of the gift, and not to give it to the trustees for those purposes for which the residue was given to them. The testator had both an intention to bequeath these leaseholds for other purposes, and a negative intention not to give them for those particular purposes.

The other points in the case seem to be clearly settled by decision. One of these rests upon the case of *Doe d. Everett* v. *Cook*, 7 East, 269, the question being whether, where there is a gift of leasehold property to one expressly for life, supposing the executors to have assented, and the legal estate to have been thus taken out of them, if there be other subsequent trusts which cannot take effect, there is any equity by which the estate can be revested in the executors, though the valid bequest of it was only for life. *Forth* v. *Chapman*, 1 P. Wms. 666, decided, that, when a person was in this position, and the leaseholds had passed from the executors by way of assent, they having assented, the whole term was out of them, and there was no way of bringing it back. If that case went farther, which I do not think it did, I should entirely concur in the observations made by Lord St. Leonards, then Lord Chancellor of Ireland, in *Ker* v. *Lord Dungannon*, 1 D. & W. 528. It would be difficult then to sustain it, and that learned judge refused to follow the case further. The argument cannot arise where the legal estate is in the possession of the trustees of the will; and that particular class of cases cannot therefore sustain the view of the plaintiff.

The next question is, whether or not the limitations of the leaseholds after the life estates are in fact void. Upon this point it is impossible to see a reasonable distinction between this case and *Lord Dungannon* v. *Smith*, 12 Cl. & F. 546. The limitations of the freehold estates here are in effect to A. for life, remainder to B. for life, remainder to unborn persons in tail, and then the trust of the leaseholds is to permit the clear yearly rents to be received, taken, and enjoyed by such person as shall, for the time being, be entitled to the freeholds, until such person shall, by good assurance, become seised of the freeholds in fee simple in possession, and then to convey the leasehold estates to him, and not till then. Clearly, there can be no acquisition of property under such a series of limitations until some tenant in tail of the freehold estates shall have attained an age at which it will be competent to him to execute a disentailing deed, by which he may acquire an absolute interest in them. That could not be done until such tenant in tail attained

twenty-one; and therefore the freehold estates might travel through a long series of successive minorities for centuries; and the case is therefore precisely similar in this respect to *Lord Dungannon* v. *Smith*.

There remains the question, whether the direction to pay the rents of the leaseholds to the person entitled for the time being to the freehold estates, can be construed to mean a payment according to their respective interests in the freeholds, namely, to a tenant for life for his life, and to a tenant in tail, so as to give him an absolute interest; but I think that view is fallacious. The trust is, to pay over the rents until an actual conveyance is made of the leasehold property; and though it is true that the word "rents" will carry the whole interest in some cases, in others it will not. The trust is to pay over the rents of the leaseholds, and not to assign them to the person for the time being entitled to the freeholds; and the effect of such person being a tenant in tail would be, if the limitation were permitted by law, that the rents must be paid to him until some person was entitled to the freeholds absolutely.

The invoking of the Statute of Limitations for the acquisition and not for the defence of a title in such a case is entirely novel; and, if it could have been considered, the argument is disposed of by the circumstance that here are legal limits, within which the trust of the leaseholds is good, and still subsisting, namely, during the two life estates which were here limited for lives in being; but the limitations beyond that being to a series of parties not ascertained or capable of being ascertained, the case is so far analogous to *Lord Dungannon* v. *Smith* and *Ibbetson* v. *Ibbetson*, 10 Sim. 495; 5 My. & Cr. 96. The true construction of this will is, that the gift of the leaseholds to the two tenants for life is good, but beyond that it is void, and the next of kin are entitled.

WILKINSON *v.* DUNCAN.

CHANCERY. 1861.

[*Reported* 30 *Beav.* 111.]

GEORGE WILKINSON, the uncle, died in 1836, having by his will bequeathed the residue of his personal estate, and the produce of real estate to trustees, upon trust for his nephew George Wilkinson for his life, and from and after his decease upon the following trusts for his children: —

"Upon trust for all and every, or such one or more exclusively of the others or other of the children or child of George Wilkinson, in such manner and form, and if more than one, in such parts, shares and proportions, and with such limitations over and substitutions in favor of any one or more of the others of the said children, and to vest and

be payable and paid, transferred and assigned, at such time or times, age or ages, and upon such contingencies, and under and subject to such directions and regulations for maintenance, education or advancement, as George Wilkinson" by deed or will "shall from time to time direct and appoint; and in default of and subject to such direction or appointment, and so far as any such, if incomplete, shall not extend, upon trust for all and every the children and child of the said George Wilkinson, who being a son or sons shall live to attain the age of twenty-one years, or being a daughter or daughters shall attain that age or be married, to be equally divided between such children, if more than one, in equal shares and proportions, as tenants in common."

The will contained no hotchpot clause.

George Wilkinson the nephew made his will in November, 1858, whereby, after reciting his uncle's will, and the power of appointment over his residuary estate therein contained, and that the residuary estate consisted of £14,500 more or less, he proceeded as follows:

"Now in exercise of the same power and of every other power so enabling me, I do hereby direct and appoint, that the trustees for the time being of the said will shall, after my decease, stand possessed of the said residuary estate, upon trust, after my decease, as to the income thereof, and until the portions of my children in the capital shall become payable and divisible as hereinafter directed, to pay the same to the trustees of my will, for the maintenance, education or advancement of my children, in such manner as they, in their uncontrolled direction, shall think most beneficial to them, such application of the income to cease, as to each child, as and when he or she shall become entitled to his or her portion of capital. And as to the capital of such residuary estate, upon trust for the benefit of my children in the manner hereinafter mentioned, viz., *to pay £2,000 to each of my daughters, as and when they shall respectively attain twenty-four years of age*; and in the event of my daughters dying under twenty-four years of age then to pay the said sum of £2,000 to her surviving sister (as the case may be). And as to the residue of such capital, to divide the same *between my sons equally* (if more than one) *as and when they shall respectively attain twenty-four years of age*, and if only one then the whole to such only son.

"And if my son George shall succeed me in my business, and on this condition only, then his share shall be paid to him at twenty-one years of age, instead of twenty-four, but not otherwise. And in the event of no son attaining twenty-four years of age, and in the event of the above provision for my daughters taking effect, then to divide the same between them, as soon as and when they shall severally attain twenty-four years of age."

George Wilkinson, the nephew, died in November, 1859, leaving ten children, two of whom were under the age of three years at his death.

A question had arisen whether the appointment to the children at twenty-four was to any extent invalid on the ground of remoteness.

Mr. Lloyd and *Mr. C. Hall*, for the plaintiffs, the sons of the nephew.

Mr. Selwyn and *Mr. Surrage*, for the four daughters.

Mr. Follett and *Mr. T. Stevens*, for the trustees of the uncle's will.

Mr. Casson, for the trustees of the nephew's will.

THE MASTER OF THE ROLLS. [SIR JOHN ROMILLY.] I will state the view I take, and I will look at the authorities, and hear the defendants if necessary.

I think that the bequest is distinct from that in *Leake* v. *Robinson*, 2 Mer. 363, and that Sir William Page Wood correctly states the principles in *Cattlin* v. *Brown*, 11 Hare, 377. He states the 5th rule thus: "Where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished, whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law. This was settled in the case of *Storrs* v. *Benbow*, 2 Myl. & K. 46."

That appears to me to be a very accurate statement of the law. The distinction between the case of *Leake* v. *Robinson* and the present is this: In *Leake* v. *Robinson* the property was given to A. for life, and afterwards to pay to such of his children as should attain twenty-five.

It was therefore impossible to ascertain the class until it was known how many children attained twenty-five, and consequently the period for ascertaining the class was beyond the time allowed by the rule of law, and too remote. But if the testator had said, that upon the death of the tenant for life, the estate should be divided into as many shares as the tenant for life had children, and that one share should be vested in each child on his attaining twenty-five, then I apprehend the bequest would be good as to those children who were of such an age at the testator's death that they must necessarily attain twenty-five within twenty-one years from the death of the tenant for life.

If the testator here had said, "and as to the capital of such residuary fund, to pay it to my daughters when and as they shall attain the age of twenty-four years," then it would come within the case of *Leake* v. *Robinson*, but here the terms of the execution of the power are, "as to the capital of such residuary estate upon trust for the benefit of my children" [that is, sons and daughters] "in the manner hereinafter mentioned, viz., to pay £2,000 to each of my daughters as and when they shall respectively attain the age of twenty-four years."

Upon the death of the second testator, who executed the power, as many sums of £2,000 were to be ascertained as he had daughters, and with respect to those who are within the period or limit of the rule against perpetuity, that is, with respect to those who had attained the age of three years at their father's death, why should not their legacies

of £2,000 each be paid to them, why are they to be affected by the invalidity of the gift to the others?

The circumstance that there is a gift over in case a daughter should die under twenty-four does not affect the matter.

What I stated in *Seaman* v. *Wood*, 22 Beav. 591, was this: — Where there is a class to be ascertained, which consists partly of persons who are clearly within the limits allowed by law, and partly of those who are not within such limits, then, as you cannot ascertain the members of the class until after the period permitted by the doctrine against perpetuities, the whole gift is void, for you do not know, and cannot ascertain, within the proper limit of time, what each person is to take.

I intended to draw that distinction in *Webster* v. *Boddington*, 26 Beav. 128, and that was the distinction taken in *Griffith* v. *Pownall*, 13 Sim. 393, and by Vice-Chancellor Wood in *Cattlin* v. *Brown*, 11 Hare, 372.

The view I take of the case generally is that which I have stated, viz., where the share of each person is ascertained, the gifts to those who happen to be within the limits of the rule against perpetuity may be good as to them, though the gifts be invalid as to the others who are beyond that limit, because the number and amount of the shares are ascertained at the proper period and within the proper limit of time.

The Master of the Rolls. I have looked at the cases, but I do not think I can add anything to what I stated yesterday. I think that the principle of the case is clearly laid down by Vice-Chancellor Sir William Page Wood in the fifth proposition which he states in *Cattlin* v. *Brown*.

I think this will afford instances of both the rules stated by the Vice-Chancellor Wood. In the gift to the daughters a sum is specifically given to each, which is not dependent on the gift to the others, and consequently those will take who can take it within the time allowed by the law against perpetuities. With respect to the gift to the sons, it illustrates the other rule. I am of opinion that it is a gift to a class which cannot be ascertained until all the members of it shall have attained twenty-four, and therefore, with respect to them, the appointment of the residue is wholly void for remoteness. With respect to the daughters, as the number of sums of £2,000 were ascertained at the death of the nephew, I think that those who attain their age of twenty-four within the period of twenty-one years from the death of the nephew are entitled to their shares, and the residue will go as unappointed.

I will make a declaration to that effect.

PICKEN *v.* MATTHEWS.

CHANCERY. 1878.

[*Reported* 10 *Ch. D.* 264.]

FRANCIS HOOFF, by his will, gave his property, real and personal, to trustees on trust to pay certain legacies and annuities, and continued as follows: "Subject as aforesaid, I direct my trustees to stand possessed of my said trust estate, upon trust for such of the children of my daughter Helen by her first husband (but not her children by her present husband), and the children of my daughter Charlotte, who being sons shall live to attain the age of twenty-five years, or being daughters shall attain that age or previously marry, whichever shall first happen; and I expressly direct that all such grandchildren shall participate equally without regard to the number of each family." And the testator empowered his trustees to maintain the children out of their expectant shares until they should respectively acquire vested interests in the trust estate.

The testator died in December, 1865. The testator's daughter Helen had at the date of the testator's death three children by her first husband, of whom the plaintiff had attained the age of twenty-five at the date of the testator's death. Charlotte had two children who were infants.

Glasse, Q. C., and *Badnall*, for the children of Helen and Charlotte.

Pearson, Q. C., and *Holland*, for the trustees.

Higgins, Q. C., and *H. A. Giffard*, for the next of kin.

MALINS, V. C. I have very carefully considered the cases which have been cited; and the conclusion to which I have come will have the advantage, that it will, I think, carry into effect the intention of the testator.

If the two daughters of the testator had had no children living at his death, the gift would have been void for remoteness; because it would not be certain that the property would vest within a life or lives in being and twenty-one years after. But this is a gift to living grandchildren. The testator evidently knew that his grandchildren were in existence, and I must attribute to him knowledge of their ages, knowledge therefore that before his death the plaintiff had attained the age of twenty-five years. Now, the rules of law applicable to this case are, first, that a gift to a class not preceded by any life estate is a gift to such of the class as are living at the death of the testator. The case of *Singleton v. Gilbert*, 1 Bro. C. C. 542, n.; 1 Cox, 68, proceeded on that footing. There, there was a demise of real estate (subject to a term to secure annuities) to all the children of A., and the heirs of their bodies. A. had two children at the death of the testatrix, and one born afterwards, but before the death of the annuitants. It was

held that the after-born child could not take, though if there had been a precedent life interest, that would have been enough to postpone the period of vesting. Lord Chancellor Thurlow, in giving judgment, says, "The general principle is that, where the legacy is given to all the children, it shall not extend to after-born children; but where it is given with any suspension of the time so as to make the gift take place by a fair, or even by a strained construction (for so far some of the cases go) at a future period, then such children shall take as are living at that period. But in this case I can see no circumstance to take it out of the general rule." That is a decision that the devise extends only to those children who are living at the death of the testator. It is a rule of convenience.

The second rule is, that where you have a gift for such of the children of A. as shall attain a specified age, only those who are *in esse* when the first of the class attains the specified age can take. All after-born children are excluded. This also is a rule of convenience. It was laid down in the case of *Andrews* v. *Partington*, 3 Bro. C. C. 401, and has been followed in numerous cases, of which *Hoste* v. *Pratt*, 3 Ves. 730, and a case before me of *Gimblet* v. *Purton*, Law Rep. 12 Eq. 427, are examples. In the latter case I proceeded on the principle that only those who were alive when the first of the class attained twenty-one could take. The maximum number to take was then ascertained. Vice-Chancellor Wigram, in giving judgment in the case of *Williams* v. *Teale*, 6 Hare, 239, makes this observation: "If a testator should give his property to A. for life, with remainder to such of A.'s children as should attain twenty-five years of age, and the testator should die living A., there is no doubt but that the limitations over to the children of of A. would be void: *Leake* v. *Robinson*, 2 Mer. 363; but if in that case A. had died, living the testator, and at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any court of justice would exclude them from the benefit of the bequest, on the ground only that if A. had survived the testator the legacy would have been void, because the class in that state of things could not have been ascertained." So that he adopts the principle that when once the class to take has been ascertained there is no objection to postponing the vesting to a future period.

Upon the authority of these cases I come to the conclusion that the persons who can take under this limitation are those who were living at the death of the testator. *Viner* v. *Francis*, 2 Bro. C. C. 658, a leading authority on the subject, shows that the same principle prevails whether the parent of the children who are to take be alive or dead at the date of the will. I have already mentioned *Singleton* v. *Gilbert* and *Viner* v. *Francis*. These cases, as well as *Doe* v. *Sheffield*, 13 East, 526, and *Doe* v. *Over*, 1 Taunt. 263, all show that a gift to a class only embraces those of the class who are living at the death of the testator.

Here there is a gift to such of a class as shall attain twenty-five. The class was ascertained at the death of the testator because one of them had then attained twenty-five. The two infant children of Charlotte Heale who were alive at the death of the testator are entitled to take, provided they attain the age of twenty-five years.

The case mainly relied on by the other side was *Griffith* v. *Blunt*, 4 Beav. 248. There Lord Langdale, in giving judgment, said that the will was really free from ambiguity; the vesting was not to take effect till twenty-five, and therefore the gift was too remote. But the real question was, In whom was the property to vest? Was the class to take ascertained at the death of the testator?

Here I hold that there is a valid gift because one of the children of Helen (by her former husband) had attained twenty-five at the death of the testator; the maximum number to take was, therefore, then ascertained, and the gift in question is not void for remoteness.

IN RE MOSELEY'S TRUSTS.

PEARKS *v.* MOSELEY.

CHANCERY, COURT OF APPEAL, AND HOUSE OF LORDS. 1870, 1878, 1879, 1880.

[*Reported L. R.* 11 *Eq.* 499; 11 *Ch. Div.* 555; 5 *Ap. Cas.* 714.]

THIS was a question of construction arising upon a clause in the will of Joseph Moseley, which was dated the 25th of April, 1831. The testator, after giving a legacy of £3000 to trustees upon trust to pay the interest to his daughter, Mary Jordan, for her life for her separate use, provided as follows: —

"And from the decease of my said daughter my will is, that the sum of £3000, the securities for the same, and the produce thereof, shall be in trust for all the children of my said daughter who shall attain the age of twenty-one years, and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years, or die under that age leaving issue living at his, her, or their decease or deceases respectively, as tenants in common if more than one, but such issue to take only the share or shares which his, her, or their parent or parents respectively would have taken if living."

The testator died on the 27th of May, 1831.

None of the children of Mary Jordan died under twenty-one leaving issue, but some died under age without leaving issue. Five attained twenty-one, of whom two died in their mother's lifetime, and the remaining three survived her.

Mary Jordan died on the 16th of March, 1869, and the legacy of £3000 was paid in court by the trustees. The three surviving children and the representatives of those who were dead now petitioned for payment of the legacy to them.

Mr. Glasse, Q. C., and *Mr. Peck*, in support of the petition.

Mr. Pearson, Q. C., and *Mr. Higgins*, for the residuary legatee.

Mr. Darley, for the trustees.

Sir R. Malins, V. C., after reading the clause in the will above set out, continued: —

There were five sons of the daughter, all of whom attained twenty-one; and though there were other children who died under twenty-one, none of them left issue. The result, therefore, was, that the class who were to take consisted of those five sons, and the legacy vested in them, unless the objection which is raised to the validity of the bequest upon the ground of remoteness can be sustained.

It was argued by *Mr. Pearson* and *Mr. Higgins*, for the residuary legatee, that the gift is void for remoteness, because it includes objects who could not necessarily be ascertained within twenty-one years after the termination of a life in being at the death of the testator. If the gift had been to the children and grandchildren as a class, that would undoubtedly have been the case, because the grandchildren would not necessarily be twenty-one years of age within twenty-one years after the death of their grandmother, but here the number of objects must be ascertained within twenty-one years after the death of the testator. It is to the children who attain twenty-one, and the issue of those who die under that age, so that necessarily the whole number of the class will be ascertained within a life in being and twenty-one years. The property, therefore, is to be divided into as many shares as the number of children who attain twenty-one, and who die under that age leaving issue, and the issue are to take just that which the parent would have taken if he had lived to attain twenty-one years.

I apprehend it is the duty of every court to sustain a will and give effect to it if possible; and although the rule of law that property cannot be tied up beyond a life in being and twenty-one years must be adhered to, yet, if the limitation can be divided so as to be good as to some shares and bad as to others, it is the duty of the court to give effect to it as far as it can, and not hold that every part of it is void; so that, if one of the children had died under twenty-one leaving issue, the gift to his issue would have been void for remoteness, because his children would not necessarily have been born at the death of Mary Jordan. But that that fact should not affect the gift to the children who did attain twenty-one appears to me, upon principle, as plain as anything can possibly be.

But some cases were relied upon by *Mr. Pearson* and *Mr. Higgins* in opposition to this view, the first of which was *Webster* v. *Boddington*, 26 Beav. 128; but there the limitation is confused and general in terms, and is not, as in this case, by way of substitution to the issue of

those who died under twenty-one leaving issue, and the period at which the children are to die is not even fixed. The gift is to the legatee's children, "whether of her present or future marriage, and the issue of such grandsons, or other child or children who, being a son or sons, shall live to attain the age of twenty-one years," but the issue of granddaughters were only to take the parent's share. I must say I think it might very well have been held that the gift was to the children who attained twenty-one and the issue of those who died under twenty-one; and if that had been the disposition of the property, as in the present case it is, I am satisfied that the Master of the Rolls would have held the limitation to be valid, for he says (26 Beav. 134): "If, on the death of Lady Webster, the estate is to be divided into as many shares as there are children of Lady Webster who survive her and children of Lady Webster who have predeceased her, leaving children, then it is perfectly good; but if it be necessary to wait until either all the children of Lady Webster shall have attained twenty-one, or until some child, or remoter issue of a child, of Lady Webster shall have attained twenty-one after her decease, in order to ascertain the number of shares into which the estate is to be divided, then it is void for remoteness, as the class to take is not to be ascertained until after a period which may exceed a life or lives in being and twenty-one years afterwards." This case, therefore, is no authority against the conclusion at which I arrive, because it is not limited to the issue of children who died under twenty-one. I think, nevertheless, that a little more liberality of construction might have led to the view that the gift was to the children who attained twenty-one, because of the words "the issue are to take the parent's share."

Another case cited, also a decision of the Master of the Rolls, was *Seaman* v. *Wood*, 22 Beav. 591, which undoubtedly is very like the present case. Indeed, I do not think it is possible to distinguish the two cases; and, therefore, if I am bound by that case, I must hold this limitation to be void. In both cases the grandchildren were only to take the share which their parent would have taken if living. Now the judgment, which is very short, and appears to have been given at the end of the argument, and I do not understand to have been a considered judgment, is in these few words (22 Beav. 594): "My opinion is, that this gift is void for remoteness. I concur in the argument that this is a question of construction upon the meaning of the words of the gift. But the way I look at it is this: If a man gives an estate or a sum of money to all the children of A. and all the grandchildren of B., to be divided among them in equal shares and proportions, and both A. and B. survive the testator, I have very little doubt that such a gift would be void for remoteness."

I have not a shadow of doubt that it would be void for remoteness, because there it is a class, children of A. and grandchildren of B. all thrown together, to take *per capita*. The gift to one part of the class is necessarily void for remoteness; and, according to *Leake* v.

Robinson, 2 Mer. 363, when one part of a gift to members of the same class is void, the whole gift is void for remoteness.

Then his Lordship continues: "For the class which consists of the children of A. and the grandchildren of B. cannot be ascertained until the grandchildren of B. are ascertained, and that will be at a period too remote." Then he puts this question: "Would the case be varied if the children were to take one half of what the grandchildren were to take?" or, as it is interpreted in Jarman on Wills (3d ed. vol. i. p. 245), "Would the case be varied if the children were to take one half and the grandchildren the other half?" In my opinion it would be totally varied, because if one moiety of any property is given to the children of A. at twenty-one, that is a valid limitation; but if the gift is to grandchildren at twenty-one, it is an invalid gift. Therefore, the gift is good as to one moiety and bad as to the other. And the question is so answered in Mr. Jarman's book. The Master of the Rolls, however, came to the conclusion that the limitation was void for remoteness. With great respect I come to an entirely opposite conclusion; and I think that the limitation to the children who attained twenty-one was good, and the rest void. The class consisted of the children who should attain twenty-one, or die under that age leaving issue, the issue to take only the parents' share. At the death of the testator the maximum number is ascertained, and the property is divided into as many shares as there are children who attain twenty-one, or die under that age leaving issue. Then, if the limitation as to the subsequent class is one which would necessarily take effect within twenty-one years after a life in being, it is good; but if it would not so take effect it is bad.

The principle of severing gifts was adopted, and has been acted upon frequently, and especially by the Lord Chancellor, when Vice-Chancellor, in the case of *Cattlin* v. *Brown*, 11 Hare, 372, where the principle upon which such gifts may be severed is clearly stated, and it is only necessary to refer to one passage in the judgment, where the Vice-Chancellor says: "The testator devises the estate to Thomas Bannister Cattlin for life, with remainder to all his children as tenants in common for life, with remainder as to every share of every child to the children of that child in fee. Now, to follow the respective shares of the property, suppose Thomas Bannister Cattlin to have four sons, A., B., C., and D., and A. and B. to be living at the testator's death, and the others to be born afterwards. A. and B., on the testator's death, take an immediate vested interest in remainder for life, expectant on their father's death, with remainder to their respective children in fee, subject to their respective moieties being diminished on the birth of C. and D., but their exact shares are ascertained within the legal limits at the death of their father, and neither their life interests, nor the remainder in fee, are capable of being wholly divested in favor of any party beyond the legal limits." It is, in reality, the case of *Storrs* v. *Benbow*, 3 D. M. & G. 390, substituting a given share for a given sum of money. Therefore, he held, as I have stated, the limitation to be good as to the

children of such children as were living at the death of the testator. The same principle of severing parts of a limitation which are good from those which are bad, was also adopted by the same learned judge in *Wilson* v. *Wilson* 28 L. J. (Ch.) 95. I may also state that there are observations upon the judgment of the Master of the Rolls in the case of *Webster* v. *Boddington*, in Jarman on Wills, (3d ed. vol. i. pp. 246, 250), with which observations I entirely concur. The result is that, in my opinion, the event here being that there were only five children of Mary Jordan who attained twenty-one, the legacy absolutely vested in them. The petitioners are three of those five sons, and they each of them take one-fifth, and the remaining two-fifths will go to the legal personal representatives, in equal shares, of the two sons, who, having attained twenty-one, afterwards died in the lifetime of the testator's daughter Mary Jordan.

The testator also gave by his will a sum of £3000 to trustees upon trust to pay the income to his son William Moseley during his life, and from his decease the testator declared that the said sum should be upon the like trusts for the son's children and issue as were thereinbefore declared of the trust money and funds for the benefit of the testator's daughter Mary Jordan.

The testator's son William Moseley had three children, two of whom died under age and without issue, and one, Harriet, attained the age of twenty-one years. She was born in 1838, and was married to H. Pearks in April, 1863. W. Moseley died on the 20th of September, 1877, and on his death the sum of £3000 was paid into court under the Trustees Relief Act.

The present petition was presented by Mr. and Mrs. Pearks and the trustees of her marriage settlement, praying that the whole fund might be paid to them.[1]

Chitty, Q. C., and *W. Barber*, for the petitioners, relied on *In re Moseley's Trusts*, Law Rep. 11 Eq. 499, in which Vice-Chancellor Malins had pronounced a decision on the same clause.

Waller, Q. C., and *Rawlinson*, for the residuary legatee under the testator's will.

JESSEL, M. R., said that he was bound by the decision of the Court of Appeal in *Smith* v. *Smith*, Law Rep. 5 Ch. 342, which he had himself followed in *Hale* v. *Hale*, 3 Ch. D. 643, in which the decision of the Vice-Chancellor in *In re Moseley's Trusts*, had been disapproved, and he therefore must declare that the whole gift after the life interest of William Moseley was void for remoteness, and the fund must be paid to the residuary legatee.

From this decision the petitioners appealed.

Chitty, Q. C., and *W. Barber*, for the appellants.

Waller Q. C., and *Rawlinson*, for the respondent.

[1] This statement is slightly abbreviated from that in 11 Ch. Div. 556.

James, L. J. This case comes before us under these circumstances: There was a decision by Vice-Chancellor Malins upon a clause of the will, and a subsequent decision by the Master of the Rolls upon the same clause entirely controverting the decision of the Vice-Chancellor. The Vice-Chancellor's decision is reported in *In re Moseley's Trusts*, and I feel bound to say that I entirely go along with the reasoning by which he arrived at his conclusion in that case; and if the matter were a matter upon which I felt myself at liberty to express my own opinion as to what the rule of law is, and as to what the proper application of the rule of law to the circumstances of such a will as this is, I should without any doubt or hesitation have concurred in that conclusion, and I rather think the Master of the Rolls would have done so too from what he said.

But unfortunately for the appellant, unfortunately for my view of what I think the law might have been, the very same point arose and had to be considered by the same Vice-Chancellor upon a will, reported in a case of *Smith* v. *Smith*, which, with every possible wish to distinguish, I have found myself utterly unable to distinguish in any circumstance whatever from the will before us. The Vice-Chancellor having so expressed his view upon exactly the same principle, as is clearly shown in that case of *Smith* v. *Smith*, that conclusion, that view, and the principle upon which and the reasoning upon which he arrived at it were brought before the Court of Appeal, consisting of Lord Hatherley and Lord Justice Giffard. The matter was fully argued by counsel, one of whom who argued for the appellant is now a Lord Justice, and therefore it is impossible to say that there was any case of inadvertence or anything of that kind, and the Court of Appeal did deliberately determine that the view of the Vice-Chancellor was not to be sustained, and did reverse that decision.

The Master of the Rolls felt that the decision of *Smith* v. *Smith* was binding upon him, as it was; and it really is not less binding upon us. It is not for us to say that the decision is erroneous. If we were to do that merely because we entertain different views, however strong, as to what would be the proper legitimate inference from former cases or the application of fixed rules to the particular language of a will, there would be nothing to be considered settled or final in the Court of Appeal, the judges sitting one day might differ from the judges who were sitting on a former day, or the judges sitting in one Division might take different views from those sitting in another, and everything would be open to fresh litigation and fresh dispute. However hard it may be upon a particular suitor that he is not able to avail himself of the personal views of the court, it is much better that that hardship, if it be a hardship, should be endured by him than that the law should be rendered more uncertain than it is, or litigation more common than it is. The decision of *Smith* v. *Smith* seems one which nothing but the House of Lords can set right if it is wrong or ought to be set right, and we being bound by it must dismiss the appeal, with costs.

Baggallay, L. J. I entirely concur with the view that this case cannot be distinguished, as far as any principle of construction is concerned, from that of *Smith* v. *Smith*. I am at the same time bound to say for myself that I agree with the views expressed by Vice-Chancellor Malins not only in the case of *In re Moseley's Trusts*, but also in the case of *Smith* v. *Smith*, when it was before him, and in the case of *Picken* v. *Matthews*, 10 Ch. D. 264, which was before him subsequently.

Bramwell, L. J. I also consider that we are bound by the case of *Smith* v. *Smith*, and that it is identical with this. I crave leave also to express a very considerable distrust as to the arguments by which that decision was arrived at.

An appeal was then brought to the House of Lords.

Mr. Chitty, Q. C., and *Mr. W. Barber* (*Mr. Romer* was with them), for the appellant.

Mr. Waller, Q. C., and *Mr. Davey*, Q. C. (*Mr. Rawlinson* was with them), for the respondents.

Mr. Glasse, Q. C., and *Mr. Darley*, appeared for other parties interested, but did not address the House.

The Lord Chancellor. [Lord Selborne.] My Lords, this case raises a question which, speaking for myself, I am surprised to find raised at this time upon the law of remoteness. As I regard the case, the question so raised is one which has been long since conclusively determined by authority, and the arguments, by which it is attempted to distinguish this case from the former authorities, do not appear to me to be capable of being maintained.

The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean, that, in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say, that, if the construction of the words is one about which a court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law.

So understanding the rule, the first question in every case of this kind is that of pure and simple construction, — what is the meaning of the words which the testator has used? What would their effect be, if there was no law of remoteness? So approaching the present will, I cannot avoid coming to the conclusion, that the words upon which everything turns, ("which issue shall afterwards attain the age of twenty-one years or die under that age, leaving issue living at his, her,

or their decease or deceases respectively,") are words of description, and not words of superadded condition. If you could find in this will a gift simply to "all the children of" the testator's "daughter who shall attain the age of twenty one years" (I am reading that gift to which the present is referential), "and the lawful issue of such of them as shall die under that age leaving lawful issue at his, her, or their decease or respective deceases" — if you could find a gift in those terms, unqualified by anything which afterwards follows, no doubt there would be no remoteness. All the shares would necessarily be ascertained within due limits of time; and it would be immaterial, if in a later part of the will you found, as to some particular share or shares, superadded conditions which might or might not be void, by reason of remoteness or otherwise. But in this case, if there was no law of remoteness, I am satisfied that no court would be justified in omitting the qualification which follows, or refusing to treat that qualification as entering into the description of the issue who are to take; "which issue shall afterwards attain the age of twenty-one years," and so on. It is, to my mind, the same thing in effect as if the testator had expressed himself thus: "For all the children of my said daughter who shall attain the age of twenty-one years, and the issue who shall live to attain that age of such of them as shall die in minority." If that were so, there can be no question that the gift to the issue would be void for remoteness; and then arises the ulterior question, whether it is possible to sever the gift to that issue from the gift to the children, so as to enable the one to stand, while the other must fall.

My Lords, I find that the Master of the Rolls, in the case of *Hale* v. *Hale*, expressed an opinion upon the construction of this very will, with which I agree. He says (3 Ch. D. at p. 649): "As I read the gift, it was the issue which should afterwards attain the age of twenty-one years. That was a part of the description of the issue, and therefore it was a mistake to say you could divide the number of shares into as many as there are children who are alive and children who died leaving issue. There is no gift to the issue as such — only to such as attain twenty-one." And he points out that Vice-Chancellor Malins in the case of *Moseley's Trusts*, which has been so frequently mentioned in the argument, made that mistake in the reasons which he gave for his decision. It does appear to me, though there may be some expressions in Vice-Chancellor Malins's judgment in the case of *Moseley's Trusts*, which may perhaps go farther, that the view which is most calculated to reconcile all parts of that judgment is, that he thought you could properly treat the whole class as necessarily ascertained within twenty-one years from the death of the testator, and the ulterior condition, that the issue should attain twenty-one, as something superadded, and not forming part of the description of the issue. If so, I cannot agree with that view of Vice-Chancellor Malins; I am obliged to agree with the view of the Master of the Rolls.

Some other cases, one of which was before Vice-Chancellor Knight

Bruce, *Riley* v. *Garnett*, 3 De G. & S. 629, and another more recent case before the present Master of the Rolls, *Muskett* v. *Eaton*, 1 Ch. D. 435, were referred to; in which, under words of apparent contingency more or less like this, it was nevertheless held, that real estate, given in remainder, vested in the whole class of children or issue, subject to be divested if they should not fulfil that condition. I consider that whole class of cases, which is very well known, to be inapplicable to the construction of gifts of personal property, such as you have to deal with here. There are some peculiar rules of law applicable to limitations of real estate; one of which is, that a contingent remainder must take effect at the time of the termination of a previous freehold estate, or not at all, unless it is supported by a fee vested in trustees; and in order to avoid the manifest disappointment of the intention of testators, and the destruction of a whole series of limitations which might result from that rule, the courts have in some cases leant to what I may describe as a rather violent and unnatural construction of words of contingency of this kind, and have treated them as descriptive, not of a condition upon which the property was to vest, but of a condition subsequent, on non-fulfilment of which it was to become divested.

In *Riley* v. *Garnett*, Vice-Chancellor Knight Bruce referred to the class of authorities on which he was proceeding; mentioning one of them, *Doe* v. *Nowell*, 1 M. & S. 327. The report of *Doe* v. *Nowell* refers to the earlier authorities, beginning with *Boraston's Case*, 3 Co. 19, and including *Edwards* v. *Hammond*, 3 Lev. 132, *Bromfield* v. *Crowder*, 1 B. & P. (N. R.) 313, and others, extremely familiar to all persons conversant with the law of real property. The rule of construction adopted in those authorities depends partly upon the law as to contingent remainders, and partly upon the principle, that, as to real estate, the courts are always unwilling to hold the fee to be in abeyance.

None of these considerations properly applies here; and I am not aware that they have ever been applied, to gifts of personal estate. Therefore, in point of construction, I come to the conclusion that these words which raise the question are words of description: that they describe the issue who are to take; and that there is no gift to any issue who do not fulfil those descriptions.

My Lords, that introduces the other question, which was principally argued by the counsel for the appellant; whether (as Vice-Chancellor Malins put it in a passage of his judgment in *Re Moseley's Trusts*, which really points out what is the true question to be determined,) you can or cannot sever the shares, whether you can, within proper limits of time, ascertain the whole number of the class — which is the same thing as the whole number of the shares — and whether it is, as he says later in the same page, "in effect a gift of a legacy to be divided into as many shares as there are children." If that were so it would be good, because the children must necessarily be ascertained within due limits

of time; and, as I said before, it would not signify what afterwards became of any particular share, any more than in the case of *Cattlin* v. *Brown*, to which reference was made. But, my Lords, the question is, Are there here two classes, or is there one class compounded of persons answering one or other of two alternative descriptions? Can you or can you not ascertain the number of shares and of sharers within the necessary limits of time?

That question has always been investigated by looking to the state of things as it was at the testator's death; and if, at that time, the whole might be too remote, then you could not rectify it, by looking to the way in which the events actually turned out at any later time. The gift in this case is to all the children of William Moseley who should attain the age of twenty-one years, and the lawful issue who should attain twenty-one years (taking *per stirpes*) of such of them as should die under that age. At the death of the testator William Moseley was unmarried. The testator died in May, 1831, and William Moseley married in November of the same year. It was at that time absolutely uncertain, whether he would ever have any child who might live to attain the age of twenty-one years. The whole class might have consisted of remoter issue, who might not attain the age of twenty-one within twenty-one years from the death of William Moseley. Not only could you not know with certainty who might be the particular members of the class, and say they must come into existence within the necessary limits of time; you could not then ascertain so much even as a minimum share to which any particular members or member of that class must, at all events, be entitled. It was uncertain whether the whole class might not eventually consist of those who would be directly affected by the vice of remoteness. How can you possibly say that there were any shares which would necessarily be ascertained, under these circumstances, within due limits of time? Still more, how could you tell how many such shares there would be?

The argument which has been offered is really this, that where a class is so defined, that certain members of it, if they come into existence at all, and if they fulfil the required conditions, must come into existence and fulfil those conditions within due limits of time, then those persons, if there was no law of remoteness, would on fulfilling those conditions within those limits of time, be entitled to a share, of which you could not, indeed, tell what the full amount would be till all the other shares were ascertained, but which at all events never could be less than a certain sum. That, my Lords, is true: but the conclusion sought to be founded upon it, that you can therefore sever such shares from others which may not be capable of being ascertained within the same limits of time, seems to me not to follow. A gift is said to be to a "class" of persons, when it is to all those who shall come within a certain category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is, that the vice of remoteness affects

the class as a whole, if it may affect an unascertained number of its members.

That was really the point decided in the case of *Leake* v. *Robinson*, because there I think four members of the class were born before the death of the testator, as to some, if not all, of whom it is manifest upon the report, that, as things stood at the time when the testator died, they must necessarily have attained the age of twenty-five years (which was the condition) — if they lived to attain it at all — within twenty-one years from the death of the testator. It was strongly argued that they ought to be severed from the rest; and, in fact, the very same argument which has been addressed to your Lordships in this case would have been equally applicable to that; because it could make no difference in principle, that they stood in the same degree of relationship to the testator, and were all the children of one father and mother.

What Sir William Grant said about that argument, and the way in which he disposed of it, was this (2 Mer. at p. 390): "To induce the court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes, and what I have to determine is whether the class can take. I must make a new will for the testator if I split into portions his general bequest to the class, and say that, because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests what he never intended them to be, namely, a series of particular legacies to particular individuals or (what he had as little in his contemplation) distinct bequests, in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death."

Mutatis mutandis, that passage appears to me to be applicable here; because it can make no difference, in principle, that here, the class being *per stirpes*, some of the *stirpes* are represented by issue of one generation, and others of the *stirpes* are represented by issue of another generation. The rule as to vesting must be exactly the same, which would have been applicable if the gift had been in this form: "in trust for all the children of my said daughter who shall attain the age of twenty-one years, or die under that age leaving issue who shall afterwards attain the age of twenty-one." In that case the children, and the children only, would have taken: that is to say, if there had been no law of remoteness, the children who were dead would have taken transmissible interests, depending upon the attainment of twenty-one by issue whom they might leave surviving them; interests which would have been part of the personal estate of the parent, and would not have gone to the issue. As far as the principle of class is concerned, it makes no difference whether the gift might be in that form, in which beyond all controversy it would have been void, or in the form in which you find it here, where the parent is to be represented by the issue,

and grandchildren substituted for children — substituted, that is to say, as original takers taking original shares, and not in the sense, which is extremely different, of persons taking by way of gift something which had previously vested in their parent, and afterwards had been divested.

I forbear from going farther into the matter, for this reason; that the whole question raised upon this will has been carefully and elaborately considered and examined by the Master of the Rolls in the case of *Hale* v. *Hale*. With every part of that judgment I agree; and that judgment anticipates the entire argument which has been used here. He says (3 Ch. D. at p. 646): "The class you could ascertain in one sense; you could say, that at the death of the widow the class could not exceed a given number, that is to say, it could not exceed all the children then living and all those who died in her lifetime leaving children; and you could say, at the testator's decease, that in no case could the whole class exceed the whole number of the testator's children, because grandchildren would only come in the place of children. In that sense the class is ascertainable; but in the other sense it is not. You could not tell how few there would be to take. You might have a division according to the number of children; then a child might die leaving a son who might attain twenty-four" (that was the age in the case of *Hale* v. *Hale*) "after the legal period; and then that share ought to come back to the others if you could divide it; but if you could not, it must remain absolutely uncertain what share each child would take until it was ascertained whether the grandchildren attained twenty-four or not." "The shares were not necessarily ascertainable at the death of the tenant for life, for you could not find out what share each child would take, although you could find out that each child must at least have a certain share. That being the state of the law, could you sever the shares? That is, could you say, I will give to each child his minimum share, and only declare so much to be void for remoteness as he may possibly take beyond the legal period? There again you would have to wait for the period of distribution to find out the share, unless you took the minimum share to be determined by the number of shares at the testator's death, in which case you would have a minimum share in the sense that a son who had then attained twenty-four must take that amount at all events, although he might be entitled to more." The testator's death of course was a much more favorable period for that argument than what we have to deal with here. Then he goes on: "As I understand it, *Leake* v. *Robinson*, and the whole of that class of cases, negative the possibility of doing so. You must ascertain the whole share in order to get out of the decisions. According to the other mode of dealing, the minimum share might be given to each child who answered the description at the testator's death, leaving the law as to remoteness to take effect as regards the difference between the maximum and the minimum share; but that is not the rule laid down by this court, which had held the whole gift void unless you can ascertain the shares within the period. The rule has been acknowledged in every

case on the subject." The Master of the Rolls refers to some of them.

I must own that I feel some degree of surprise, after that very careful and well-reasoned judgment, that encouragement should have been given to the appellant to bring this question to your Lordships' bar. It may be that if *Jee* v. *Audley*, 1 Cox, 324, *Leake* v. *Robinson*, and a long series of cases which have followed them, had never been decided, the courts might have reasonably wished, if they could, to find some means of modifying the application of the rule of remoteness, so as to preserve as much as possible of the intention of testators, and sacrifice only, if they could discover it, the real excess. But whatever one might have thought of the possibility of doing this, if the question had been entirely free from decision, it has been long since settled and determined; and I apprehend that now no authority less than that of the legislature can alter it. I must therefore move your Lordships that this appeal be dismissed, with costs.

Lord Penzance. My Lords, I confess that upon hearing this case opened and referring to the judgment which your Lordships are now asked to set aside, I felt considerable difficulty in coming hastily to any conclusion that the case of *Smith* v. *Smith*, to which reference was made, was one that ought not to be examined with regard to the propriety of the reasoning contained in it; for, the Lords Justices in the judgment from which this appeal is made, although they felt themselves, as they said, bound by that case, threw out suggestions, in very unmistakable terms, that, but for that case, they would have been of a contrary opinion; and the great respect that I have for the Lords Justices induced me to look very vigilantly at that case of *Smith* v. *Smith*, under such circumstances, in order to see whether there was room for any reconsideration of the principles contained in that case with a view to their alteration.

But, my Lords, on referring to the judgment of the Vice-Chancellor with which the Lords Justices said they entirely agreed, I find myself in great difficulty, because the Vice-Chancellor's judgment appears to me to have proceeded upon a supposition that the language of the will was different from what it really was. The learned Vice-Chancellor says, "Here the number of objects must be ascertained within twenty-one years after the death of the testator." "It is," he says, "*to the children who attain twenty-one and the issue of those who die under that age*; so that necessarily you ascertain the whole number of the class within a life in being and twenty-one years."

But, my Lords, it is not so. That is not the provision of the will. The provision of the will is to "the children of the daughter who shall attain the age of twenty-one years and the lawful issue of such of them as shall die under that age," . . . "which issue shall afterwards attain the age of twenty-one years." It is those words that, according to those who wish to hold this gift void, bring the case within the operation of the law against perpetuities, and the judgment of the Vice-Chancellor

omitting those words altogether fails to meet the case which is here alleged against the gift.

Now, my Lords, that being the case, I thought it desirable to look a little into what is the principle upon which all previous cases have proceeded. We are asked to set aside the judgment, or at least to differ from the judgment, in *Smith* v. *Smith;* but as far as I can see, your Lordships must not only do that, but you must differ from the principle contained in the case of *Hale* v. *Hale*, the principle contained in the case of *Bentinck* v. *The Duke of Portland*, 7 Ch. D. 693, and not only that, but also in the case of *Leake* v. *Robinson*. I should have quoted to your Lordships the language of the Master of the Rolls, Sir William Grant, in *Leake* v. *Robinson*, but my noble and learned friend the Lord Chancellor has already done so, and I do not repeat it. It is quite plain, as it seems to me, from the language there used that the principle of *Leake* v. *Robinson* directly applies to this case. My Lords, the Master of the Rolls in *Hale* v. *Hale*, dealing with that principle, says this: "A will takes effect at the death of the testator, and any gift made by it is void for remoteness if it does not necessarily take effect within twenty-one years from the termination of any life then in being;" in other words, unless the objects can necessarily be ascertained within the legal period. That I take it is a proposition which nobody disputes.

Upon that it is contended that where the gift is to a class that may consist of several members, and you can ascertain the maximum number of that class, you should hold valid the bequest to such members of that class as are within the period prescribed by the law against perpetuities, and invalid with regard to those who are without that period. That is a proposition which, as the Lord Chancellor has already said, is one that might very well have been debated a hundred years ago, and might be worthy of consideration now, if the question now were one of legislation; but in the present day, after all that has passed, after the decision in *Leake* v. *Robinson* and all the cases that have followed it, it appears to me that that is a contention which would be directly in the teeth of those cases, for it was not only *Leake* v. *Robinson* which enunciated that doctrine, but a case in your Lordships' House of *Dungannon* v. *Smith*, 12 Cl. & F. 546, distinctly adopted it. It was there said that where a testator has made a general bequest embracing a great number of possible objects, there is no authority for holding that a court can so mould it as to say that it is divisible into two classes, one embracing the lawful and the other the unlawful objects of his bounty. Therefore, your Lordships have a decision in your own House distinctly adopting the principle of *Leake* v. *Robinson*.

These being the principles on which the matter rests, then comes the question of the construction of this will. Now, under the will could the objects of the testator's bounty be ascertained within the life or lives in being, or within twenty-one years afterwards? The primary object of his bounty was William Moseley. Well, of course, he was ascertained. Then there are the children of William Moseley. William

Moseley was the life in being, and when he died of course his children could be ascertained. Then there is another portion of the objects of his bounty — there are these children of the children who died under twenty-one — so many children of the children, or in other words, so many of the grandchildren, as should live to the age of twenty-one. It is impossible to say you could ascertain the number or the existence of such persons within the life of William Moseley, or of any other life in being, and twenty-one years afterwards. Therefore, supposing that the will received its natural construction, and the words upon which so much has been said, beginning within the words "which issue shall afterwards attain the age of twenty-one years," be considered part of the description, it is unquestionable that you could not ascertain of how many members that class would consist. If William Moseley had three children (which he had) you could ascertain that there never could be more than three shares, each child having one; but you could not ascertain, without going to a period beyond the period prescribed by law, how many of those children would leave children that would attain the age of twenty-one, themselves dying under twenty-one. Therefore I think it is unquestionable that although you might ascertain the minimum, you could not ascertain the actual share of the persons entitled under this description to the testator's bounty.

My Lords, that being so, the only question that remains (and indeed that seems to me the only question that exists in the case) is whether you can possibly so twist (I might almost say) the language the testator has used, as to consider that the first part of that bequest contained a description of the class, and that the words which follow, "which issue shall afterwards attain the age of twenty-one" were words of condition subsequent or of defeasance. That seems to me to be the only practical question and the only way in which any question could be raised upon this will, consistently with the decisions that have gone before.

Now it was very ably argued by Mr. Chitty that cases had existed in which words of this character have received a construction of that kind, but, as my noble and learned friend on the woolsack has pointed out, those cases were cases of a peculiar description. They were not cases applicable to personal property: they were not cases in any degree *in pari materia*, or of similar character with the present; and, above all, they were not cases in which this law of perpetuities came in question, in respect of which it has been laid down and taken as an axiom of interpretation, that you should construe the will first according to its natural meaning, without any regard to the effect which that meaning might have according to the law of perpetuities, and afterwards apply that law. Therefore, I do not think those cases are cases which your Lordships should adopt as a rule for construing this will.

But the case of *Festing* v. *Allen*, 12 M. & W. 279, to which allusion has been made, is a very strong case to the opposite effect. There the words were not "which issue shall attain the age of twenty-one," but "who shall attain that age." Now I suggested in the course of the

argument that whether the words "which issue shall attain" or "who shall attain" are used, the meaning cannot be different. It is impossible, I think, to suggest that there is any difference between the meaning which naturally flows from the use of the words "which issue," and the meaning which flows from the use of the word "who." They seem to me to be alternative expressions for the same idea. In *Festing* v. *Allen* the word was "who," and there was a most distinct decision, after some consideration, pronounced by Baron Rolfe in the Court of Exchequer in that case, that the words "who shall afterwards attain the age of twenty-one years," formed part of the description.

It seems to me, therefore, my Lords, that whether you look at the construction of this will, as if no such question had arisen before, and construe the language according to its natural meaning, or whether you look at a case like *Festing* v. *Allen*, where the matter has been the subject of previous decision, your Lordships can arrive at no other conclusion than that the meaning of this clause in the will was, that a class should be created to consist, in the first place, of the children of William Moseley, and, in the second place, as part of the same class, of their children, if those children should attain the age of twenty-one years. That is the common sense meaning of the clause, and it is also a meaning consistent with the case to which I have just drawn attention.

I will only add that, as regards the judgment of the Vice-Chancellor in the present case, that judgment is in entire accordance with a previous judgment of his in the case of *Re Moseley's Trusts*, and that, on that case being cited before the present Master of the Rolls in *Hale* v. *Hale*, the Master of the Rolls dealt with the judgment of the Vice-Chancellor, as it appears to me, in a way with which I should have entirely agreed, and explained that that judgment could only have been arrived at, and was arrived at, by omitting the most material part of the will — I mean material in the sense of its creating the difficulty against which the appellant has now struggled.

Under these circumstances, I agree that the decision of the court below should be affirmed.

Lord Blackburn. My Lords, I am entirely of the same opinion.

This case comes in a peculiar manner before this House. The Master of the Rolls, when he had it before him, said, and said correctly, that the case of *Smith* v. *Smith* was precisely in point, and, being a decision in the Court of Appeal, he must follow it. In the Court of Appeal the learned judges also said "the case of *Smith* v. *Smith* is precisely in point, and we are as much bound to follow it as the Master of the Rolls was;" but each individual judge in the Court of Appeal said that he did not agree with the reasoning of *Smith* v. *Smith*, but they did not enter into the details, or show us how or why they did not agree with that reasoning. That has occasioned to me, all through, the great embarrassment I have felt in this case, for I apprehend it is never safe to say that a man's opinion is wrong until you appreciate the arguments which have led him to that opinion; and up to this moment

I am unable to find out what were the arguments which led the Judges of Appeal to say that they thought the decision in *Smith* v. *Smith* was wrong.

I could perfectly well understand that it might be said originally, if the thing were beginning *de novo*, that it operates at times very harshly, and in this particular case it does operate extremely harshly, that where part of a class are out of the limits of perpetuity, the whole interest of that class should be void, and that that one — in this case the only one who existed of that class, and who was not beyond the limits of perpetuity — is to take nothing — the whole being void. I perfectly understand that it could be said that that was a thing against which, although it was originally so determined, there was a great deal to be said, but there would also be a great deal to be said in its favor. But then I do not think that can be the ground upon which the Lords Justices of Appeal went, because it certainly seems clear that that has, at least since the time of the decision of Lord Kenyon, or at all events since the decision of Sir William Grant, more than sixty years ago, been considered positive and settled law, and there has been no dispute at all about its being law; and now it is no more competent to your Lordships' House to say that you will reverse that long-established law than it was for the court below, the Court of Appeal, to do it.

But I do not think that it could have been upon that ground that the Court of Appeal went, for Lord Justice James refers to the reasoning of Vice-Chancellor Malins in *Re Moseley's Trusts* and says that but for *Smith* v. *Smith*, "I should without any doubt or hesitation have concurred in that conclusion, and I rather think that the Master of the Rolls would have done so too."

Now, my Lords, the strange and peculiar thing there is, that when we look at the reasoning of the Vice-Chancellor in *Re Moseley's Trusts*, in which Lord Justice James supposes the Master of the Rolls would have concurred, we find that in *Hale* v. *Hale*, the Master of the Rolls gave a long and elaborate judgment, the pith and object of which was to show that he did not agree with the reasoning of Vice-Chancellor Malins in *Re Moseley's Trusts*, and I confess myself, upon looking at the matter, I have been puzzled to make out what was the ground on which the Court of Appeal went.

However, my Lords, putting that aside, I at once agree with what my two noble and learned friends who have spoken before me, have said. It seems to me that in the first place, it is established by a long series of authorities, that if the gift be to a class some of whom are beyond the limits in the way of remoteness, the whole is void — I regret that it is so in this case, but I cannot help it — it is the rule. Secondly, I think it has been established by a long series of authorities that we are to construe the will just as if there was no such rule of law as that of perpetuity or remoteness, and see whether the gift is to a class, and afterwards ascertain whether the class is one, part of which is beyond the limits of remoteness. Construing it in that way I cer-

tainly do agree entirely with the Master of the Rolls in *Hale* v. *Hale* that Vice-Chancellor Malins does construe this will contrary to what I should have thought was the obvious construction, and does so entirely by ignoring, — in all he says at least, — he may have had them present to his own mind — I cannot tell that, — the words which occasion the whole difficulty and doubt.

Taking that view of the matter I do not think it is necessary to go farther into the question than to say that I quite agree with what the Master of the Rolls said in *Hale* v. *Hale;* and taking that to be the construction of the will, and taking the rule as I have previously said to be established by authority, the only doubt I can entertain as to the propriety of affirming this decision, and as a consequence affirming the decision in *Smith* v. *Smith,* is, what I said at the beginning, that I am not at all sure that I appreciate the grounds on which persons of such learning as the three Lords Justices of Appeal thought that that reasoning was not satisfactory.

Lord Watson. My Lords, at the conclusion of the argument at the bar, the main, I may say, the only, difficulty which I felt in this case arose from a suspicion that I had failed to appreciate the grounds of judgment assigned by the learned Vice-Chancellor, which received the warm approval, apparently, of the learned judges of the Court of Appeal. But I have been very much relieved by the observations which have fallen from your Lordships, and I am constrained to believe that the error, if I may so call it, upon which that judgment of the Vice-Chancellor is based, arises, I will not say from his ignoring these very important words in Joseph Moseley's bequest " which issue shall afterwards attain the age of twenty-one years or die under that age, leaving issue at his, her, or their decease or deceases respectively," but at all events from his having failed to give their due and proper effect to these words.

My Lords, I am quite satisfied that according to the just construction of this will, the words must be read as part of the description in which they are imbedded, and that they do aptly express this qualification that no grandchild of the testator shall take who does not attain the age of twenty-one, or who dies before that period not leaving surviving issue of his body.

Now, that being the right construction of the will, as your Lordships have also held, I think that the legal principles applicable to the case are in themselves very clear, and not only so, but that they are principles established by a long, weighty, and consistent series of authorities.

My Lords, it would be a waste of the time of this House were I, after the full exposition of the law which has been given by your Lordships, to make any comment upon those cases. Therefore I content myself with saying that I concur with your Lordships' views both as to the construction of this will and also as to the principles of law which must govern the case.

Note. — See *Herbert* v. *Webster*, 15 Ch. D. 610 (1880) p. 696, *post.*

SECTION III.

MODIFYING CLAUSES.

RING *v.* HARDWICK.

CHANCERY. 1840.

[*Reported* 2 *Beav.* 352.]

THE question in this case arose upon the will of William Davies, dated in 1825, whereby he gave his residuary personal estate to P. Hardwick, Wm. Clare, and his wife, Mary Davies, upon trust to convert and to invest in their names upon government security, and to pay the dividends and the rent of the leaseholds, &c. to his wife, Mary Davies, "during the term of her natural life or widowhood;" and he proceeded as follows: "And from and immediately after the death or second marriage of my wife the said Martha Davies, then upon trust that they the said Philip Hardwick, William Clare and Mary Davies, or the survivors, &c., do and shall with all convenient speed collect in the outstanding parts of my said personal estate, and add the same to my money in the funds, and *make a division* of all the said money then in the funds, &c., and all and every other parts or part of my said personal estate *between all and every of my four children*, viz. my two sons, the said William Davies and James Davies, and my two daughters, the said Mary Davies and Martha Ann West." He then provided that the "division" was not to be made into four equal parts, but that a sum of £2000 should be appropriated and paid out of the shares of his sons, James and William Davies, "to or for the use and to augment *the shares* of his two daughters, the said Mary Davies and Martha Ann West, in equal shares and proportions, to be received by or for the use of them the said Mary Davies and Martha Ann West. And subject thereto the division of all and singular his said personal property at the decease or second marriage of his said wife, the said Martha Davies, was to be equal, share and share alike, between his said four children, viz. his said two sons, the said William Davies and James Davies, and his said two daughters, the said Mary Davies and Martha Ann West, the shares of his said two sons, the said William Davies and James Davies, were to be paid and transferred to them immediately upon the decease or second marriage of his said wife, the said Martha Davies, upon their first appropriating thereout, or otherwise paying the said sum of £2000 to or for the use of, and to augment *the shares* of his said two daughters, the said Mary Davies and the said Martha Ann West; to hold the said shares unto them the said William Davies and James Davies severally and respectively, and

their several and respective executors, administrators and assigns, from thenceforth absolutely forever."

The will then contained a gift over between the surviving brother and sisters of the sons' shares, in case either died unmarried and without issue before their shares should become payable, and proceeded as follows: "*But as touching and concerning the shares of my said personal estate*, which with the said augmentations will become the property *of my said daughters*, the said Mary Davies and Martha Ann West, upon the decease or second marriage of my said wife, the said Martha Davies, my directions are, and I do hereby declare my will and meaning to be, that the whole of such shares and augmentations shall immediately upon the decease or second marriage of my said wife, the said Martha Davies, be invested and laid out upon government security at the Bank of England, under the superintendence of them, the said Philip Hardwick and William Clare, or the survivor of them, in manner following, that is to say, the share and augmentation of the said Mary Davies as hereinbefore mentioned, and also any other augmentation, which may become her share by the decease of the said William Davies and James Davies or either of them unmarried and without issue, as is also hereinbefore mentioned, or by the decease of the said Martha Ann West, as hereinafter mentioned, shall be so invested and laid out in the names of the said Philip Hardwick, William Clare and William Davies, or the survivors, &c. jointly with and in the name of her the said Mary Davies, upon trust that they the said Philip Hardwick, William Clare and William Davies, &c. do and shall permit my said daughter, the said Mary Davies, to receive the dividends for life for her separate use;" "and from and after her decease then upon further trust that they, the said Philip Hardwick, William Clare and William Davies, &c. do and shall pay, divide and transfer the capital money which formed the share and augmentation of my said daughter, the said Mary Davies, unto, amongst and *between all the children*, whether male or female, and both male and female of my said daughter, the said Mary Davies, in equal shares and proportions, and *to become vested in such children respectively at the age of twenty-five years;* and if any such children or child shall die under that age, the share or shares of all and every such children or child shall be divided amongst the survivors of such children who shall live to attain that age; and if only one child shall live to attain that age, then the whole of such share and augmentation shall belong to such only child upon his or her attaining that age; and if it shall happen that the said Mary Davies shall depart this life without leaving any such children or child who shall live to attain the said age of twenty-five years, then the whole of the said shares and augmentations shall be upon trust, and shall be divided *between all the children* of the said William Davies, James Davies and Martha Ann West, whether male or female, and both male and female, *who shall live to attain the said age of twenty-five years*, in equal shares and proportions; and if only one such child shall live to attain that age, then

the whole of such share and augmentations shall belong to such only child upon his or her attaining that age."

The testator declared similar trusts, *mutatis mutandis*, of Martha Ann West's share, and contained the following powers of maintenance and advancement: "Provided always, that in case of the death of the said Mary Davies or the said Martha Ann West before their children, or the children or child of either of them, shall have attained the said age of twenty-five years, or in case they the said Mary Davies and Martha Ann West, or either of them, shall depart this life without leaving any children or a child, and there shall be then living any children or a child of the said William Davies and James Davies, or either of them, but such children or child may not then have attained the said age of twenty-five years, it shall be lawful for the said Philip Hardwick, William Clare, and William Davies, &c. to receive the dividends of the share and augmentations of the said Mary Davies and Martha Ann West, or either of them, as the case may be, and apply the same dividends, or a competent part thereof, *for the education and maintenance* of the children or child of the said Mary Davies and Martha Ann West, or of the said William Davies and James Davies, as the case may be, until such children or child shall attain the said age of twenty-five years, according to the true intent and meaning of this my said will as hereinbefore mentioned and expressed in respect thereof; and upon the same principle, in the event or events last aforesaid, it shall and may be lawful for the said Philip Hardwick, William Clare and William Davies, &c. with the consent of the said Mary Davies and Martha Ann West during their respective lifetimes, and after their deaths or the death of either of them, then in the discretion of the said Philip Hardwick, William Clare and William Davies, &c., by sale of any part of the said government securities, to raise and advance any part *of the share of any one or more of the said children for their advancement* in the world, not exceeding one quarter part of the probable expectant share of every one such."

The testator died in 1827; his widow survived him but a short time; his daughter, Mary Davies, married the plaintiff, Mr. Ring, and died in 1829, without having had any child born alive, and the plaintiff was her administrator. The testator's sons, William Davies and James Davies, were also dead, and had left children. Martha Ann West was living, and had children, two of whom were born in the testator's life.

The questions which arose upon the death of Mary Ring without children, as to the share intended for her and her children, were first, whether the gift over to the children of her brothers and sisters was too remote; and if so, then whether under the circumstances she took a life or an absolute interest in that share.

Mr. Pemberton, *Mr. Purvis*, and *Mr. Humphry*, for the plaintiff.

Mr. Bethell, for Mrs. West.

Mr. Kindersley, for the representatives of William Davies.

Mr. Tinney and *Mr. Keene* for the children of Mrs. West.

Mr. Pemberton having commenced his reply,

The Master of the Rolls [Lord Langdale] said: The children, on whose behalf this case has been argued, if they take anything must take it under that clause directing a division between all the children "who should live to attain the age of twenty-five years." It is admitted, that a gift expressed by those words is by itself too remote and void; but then it is said, there are other directions in the will which ought to qualify that construction. The directions are first of all, upon the death or second marriage of the wife to invest, &c. the particular share previously given to a daughter, in the name of the trustees. Then it is said, that in the subsequent clause, which refers to a period when the children are under twenty-five, that which was intended for the children is termed "the share" of the children, and that, therefore, the gift is vested, subject to be divested; but I consider this share means such share as had been before given, that is, a share for such as should live to attain twenty-five years, and this subsequent clause cannot therefore alter the effect of the previous gift. Next it is said to be a gift with a double aspect. I am of opinion that that is not the true construction of the clause. In respect to the clauses for maintenance and for raising money for advancement, they are accessories to that which is void, and cannot therefore alter the construction. Upon the other point as to the extent of the gift to the daughter, I will hear a reply.

Mr. Pemberton having replied,

The Master of the Rolls said: I think that there is sufficient to be collected from the prior words in this will to give an absolute interest to the daughters; and those prior words are so connected with what follows as to show that the testator intended a restriction of that absolute interest; and the restriction not having become effectual, the whole interest remained according to the original gift.

WHITEHEAD *v.* BENNETT.

Chancery. 1853.

[*Reported* 22 *L. J. Ch. N. S.* 1020.]

Samuel Barker, by his will, dated the 21st of November, 1834, appointed Joseph Todd, Edward Loyd, Benjamin Braidley and Robert Bennett, to be his trustees and executors, to whom and their heirs, executors and administrators he gave, devised and bequeathed all his freehold, leasehold and personal property upon trust to sell, when and as they should think proper. The testator then gave several annuities and legacies, and continued: "All the money arising from the sale of my freehold and leasehold estates, and the money arising from my personal estate not consisting of money, as well as all my moneys, to be

invested for the benefit of my three daughters, Maria Whitehead, widow, Anne Bennett, wife of Robert Bennett, and Mary Bennett, wife of Charles Bennett, and the interest thereof to be paid to each of my said daughters during their respective natural lives without the control of their husbands, and on the decease of each of them I do will and direct that one half of the fund or share from which interest or the income thereof is hereby directed to be paid to the parent respectively for life as aforesaid, shall be paid to the children of each of my daughters so dying, equally, at the age of twenty-one years. And it is my will that the interest of the other half shall be paid to the children of each of my daughters for their respective lives, and on the decease of my said grandchildren respectively, the share of which they, my said grandchildren, are only to receive the interest thereof for life as aforesaid, to be paid to their children respectively when and as they attain their respective ages of twenty-one years.

The testator died, leaving his three daughters, Maria, Anne and Mary surviving him.

Maria and Anne were still living and were defendants to the suit, but Mary died in 1837, before the suit was instituted, leaving four children, who were also made defendants.

There were several great-grandchildren of the testator, one of whom was born after the testator's death.

The first question was, whether or not the gift to the testator's great-grandchildren was void for remoteness. The next question was, whether the three daughters of the testator took absolute interests under the will. There was also a question as to the rights of the children of Anne, inasmuch as some of them might die in their mother's lifetime, but which, under the circumstances, it was not necessary to decide at present.

Mr. Daniel and *Mr. Berkeley* opened the case on behalf of the trustees.

Mr. Follett and *Mr. Bazalgette*, on behalf of the daughters of the testator.

Mr. Bacon and *Mr. Shapter*, for the eldest son of Mary, the deceased daughter.

Mr. James, *Mr. Smythe*, *Mr. Haddan*, *Mr. Hodgson* and *Mr. Bury*, appeared for different defendants.

KINDERSLEY. V. C. It seems impossible to argue that the limitation to the great-grandchildren is not void. Indeed, that question has scarcely been pressed. There is no doubt whatever about this general principle, that if a residue or sum of money by way of legacy, be given or appointed to A. by a testator in the first instance, and then there is a modification of that gift, or a limitation over for the benefit of persons, the issue of the parties, although those subsequent limitations may fail, no doubt, the first gift, which was an absolute gift, would prevail, no matter whether it was a gift or an appointment under a power. The question here, then, really is this, whether there is such

a gift to the party in the first instance, as to come within the principle and the authorities cited? Is there a gift to one daughter or to each of the daughters of a third part of the money, and then a limitation of the share thus given in the first instance absolutely, in such a form as that it falls within the principle, so as to make each of the daughters entitled to the benefit of the first absolute gift? In the first place, it is very questionable whether a direction to invest for the benefit of the daughters subject to these limitations, would amount to an absolute gift. It seems clear that a gift to invest for the benefit of A., B. and C. would be enough if it stopped there, but it does not follow that a mere direction to invest, followed by the limitations in this will, would be an absolute primary gift, but where there is a gift to invest for the benefit of daughters, how can I say the testator meant to make an absolute gift to the daughters as joint tenants, and then to go on and limit, not that gift in joint tenancy, but one half of the third share to the children of one, and then as to the other moiety of that third, to the children of that one for life? Can I say that the testator meant it to be an absolute gift with that sort of limitation, even if it were a joint tenancy? What he meant was, that this money should be invested for the benefit of his daughters, and then he directs how they are to derive that benefit. He does not express that he has given a share to each for life; he carefully abstains from that, and speaks of it as the share, the income of which is given to the daughter for life. Therefore, I think, taking all the will together, though I admit that a clear direction to invest for the benefit of A., B. and C. would be an absolute gift to them, yet that, in this case, there is not an absolute gift to the daughters, and that the principle of the cases cited is not impeached. I acted on this principle myself in the case of *Harvey* v. *Stracey*, 1 Drew. 73, and should do so again if the same circumstances occurred; but I do not consider this case within the principle. I ought to have observed that the other question, as to the rights of the children of Anne, does not arise. I think I am bound to say that it is clear, whatever the testator does not dispose of goes to the heir of the testator *qua* heir, because he is entitled to every portion of the testator's real estate which is undisposed of. There was the case of *Fitch* v. *Weber*, 6 Hare, 145, where the testator charged his estate for the benefit of certain persons, and it was held that the heir was entitled to the benefit of what was undisposed of, because it was part of the testator's real estate, and he is entitled to it whether conversion has taken place or not.

IN RE RIDLEY.

BUCKTON *v.* HAY.

CHANCERY DIVISION. 1879.

[*Reported* 11 *Ch. D.* 645.]

FRANCIS RIDLEY, by his will, dated the 8th of January, 1863, directed his trustees to invest a fund in the securities thereby authorized, and to stand possessed of a moiety of such securities upon trust to pay the interest thereof to his niece Alice Ridley for her life, and after her death, in trust for all and every the children or child of the said Alice Ridley as should be living at the time of her death, and the issue then living of such of them as should have died in her lifetime, in equal shares, such issue to take their respective parents' shares; and in case there should be no child of the said Alice Ridley, or no child or issue who should attain a vested interest in the said moiety, then in trust for such person or persons as the said Alice Ridley should, whether covert or sole, by will appoint; and in default of such appointment in trust for her next of kin who should be living at the time of her death and such default or failure of her issue as aforesaid, according to the Statutes of Distribution. And the testator directed that his trustees should invest the sum of £4000 in the securities authorized by his will, and stand possessed thereof in trust to pay the interest thereof to his niece Mary Cooper during her life, and after her death upon the same trusts in favor of the children or issue or parties claiming under any will of the said Mary Cooper in all respects as were thereinbefore declared concerning the securities bequeathed in trust for the children of the said Alice Ridley. And the testator, after making other bequests, proceeded as follows: "Provided, also, and my will further is that the several legacies and bequests whether of income or principal hereby given to or for the benefit of any legatees, being females, shall be for the respective sole and separate use independent of and free from the debts, control, or engagements of any husband or husbands whomsoever, and that the receipts of such legatees respectively, whether covert or sole, shall be good and sufficient discharges to my trustees, but not so as to enable such legatees respectively to anticipate, charge, sell, and dispose, or otherwise encumber such legacies and bequests, or the annual income thereof, or any part thereof respectively."

The testator died on the 1st of May, 1863.

In 1864 a decree was made for the administration of the testator's estate, the plaintiffs being some of his next of kin, and the defendants the trustees of the will, who transferred into court a sum of £4200 5*s.* 2*d.* Consols representing the legacy bequeathed in favor of Mary Cooper, and the income of the fund was paid to her during her life.

Mary Cooper died in 1878, having had eight children, six of whom

died in her lifetime without having been married. The remaining two, daughters, survived their mother. They were born in the testator's lifetime and had attained twenty-one and married. Both their husbands were now living.

This was a petition presented by the two married daughters by their next friend, praying that the fund in court might be paid out to them in moieties on their separate receipts.

The husbands were made respondents to the petition.

The question was whether the restraint on anticipation was void as transgressing the law against perpetuities.

Chitty, Q. C., and *Oswald*, for the petitioners. We submit that the restraint on anticipation is void as infringing the rule against perpetuities, though the remainder of the gift is good. The petitioners are, therefore, entitled to the fund absolutely, discharged from the restraint.

[JESSEL, M. R. Why should a restraint on anticipation be void? It is only a mode of enjoyment.]

It has been held that a restraint on anticipation in a gift or appointment which may include unborn children is void, as being too remote: *Armitage* v. *Coates*, 35 Beav. 1; *In re Cunynghame's Settlement*, Law Rep. 11 Eq. 324; *In re Michael's Trusts*, 46 L. J. (Ch.) 651.

[JESSEL, M. R. The question is, whether a restraint on anticipation is not an exception to the general rule against perpetuities and remoteness, following out the legal principle that property shall not be inalienable.]

No exception has yet been allowed against the rule of perpetuities.

[JESSEL, M. R. The rule against perpetuities is that you shall not make property absolutely inalienable beyond a certain period. It is only a rule in favor of alienation.]

In *Thornton* v. *Bright*, 2 My. & Cr. 230, Lord Chancellor Cottenham held that an appointment by a father under his marriage settlement to his married daughter for her separate use, without power of anticipation, was a good appointment to the extent of the separate use, and that decision was followed by Lord Hatherley, when Vice-Chancellor, in *Fry* v. *Capper*, Kay, 163, where he held that the restraint on anticipation was void and might be rejected, though the separate use might be sustained.

[JESSEL, M. R. The judges do not seem to have considered the real point. If a restraint on anticipation is an infringement of the rule against perpetuities, a father would be prevented from appointing to his children, under a settlement, in a way most beneficial to his daughters.]

If the rule is broken into at all, it is difficult to see where it is to stop.

[JESSEL, M. R. The question is whether this is not to be the exception to the rule. Why should not a father appoint to his daughters in a way most beneficial to them, that is, appoint in such a way that the

daughters and not their husbands, who are not the objects of the settler's bounty at all, shall have the benefit? The restraint on anticipation was thought so beneficial that it broke into the general law against inalienability; that is to say, all property was to be alienable except a married woman's.]

The authorities are certainly against a restraint on anticipation being imposed upon a class of persons some of whom may possibly be unborn.

Whitehorne, for the trustees, referred to *In re Ellis' Trusts*, Law Rep. 17 Eq. 409, and *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627.

Owen, for the husbands.

Jessel, M. R. The law upon the present point appears to me to be in an unsatisfactory state, and I hope it may eventually come to be considered by the Court of Appeal.

This gift is, in effect, to a person for life, and then to her children living at her death; daughters who are married women to take with a restraint on anticipation. The question is whether the gift is void, or whether the restraint alone is void and the gift is good.

Now, it is necessary to consider what the meaning of a restraint on anticipation is, for with the exception of a single observation in one of the authorities, to which I will refer presently, the point does not seem to have been discussed at all.

In the first place, the law of this country says that all property shall be alienable; but there has been one exception to that general law, for restraint on anticipation or alienation was allowed in the case of a married woman. That was purely an equity doctrine, the invention of the Chancellors, and is, as I have said, an exception to the general law which says that property shall not be inalienable. That exception was justified on the ground that it was the only way, or at least the best way, of giving property to a married woman. It was considered that to give it her without such a restraint would be, practically, to give it to her husband, and therefore, to prevent this, a condition was allowed to be imposed restraining her from anticipating her income, and thus fettering the free alienation of her property.

That ground I must assume to be correct. The result, therefore, was that the exception to the general law was in favor of married women, to enable them to enjoy their property.

Then there was another rule, also invented by the Chancellors, in analogy to the common law. That was an invention of a different kind from the other, and was this time in favor of alienation and not against it. The law does not recognize dispositions which would practically make property inalienable forever. Contingent remainders were introduced, which had the effect of rendering property inalienable. The doctrine of contingent remainders was discussed by the Chancellors, who held that a remainder depending upon what was called a possibility on a possibility was contrary to the common law. That was a wholesome rule, only it was considered that it did not go far enough. The

result was that the Chancellors established this rule in favor of alienation, that property could not be tied up longer than for a life in being and twenty-one years after. That is called the rule against perpetuities. This rule, therefore, was established directly in favor of alienation: it merely carried out the principle of law that property is alienable. Similarly in the case of executory interests, the law put a limit or fetter upon the testamentary power. The theory of both rules is, however, the same, namely, that property is alienable, though it may be made inalienable to a certain extent and in a peculiar way.

The question is, whether the restraint on alienation should not be allowed within certain limits under the one rule as well as under the other. The first exception is a clear and manifest exception to the general law, which says that property shall be alienable; the question is, whether there should not be a similar exception to that branch of the general law which says that property shall not be inalienable beyond a life in being and twenty-one years after. But this question does not appear to me to have been well weighed or considered.

Take the case of an ordinary marriage settlement, where property is settled for the benefit of the husband and wife and then on their children as they shall appoint. They have sons and daughters. If the exception applies to the rule against perpetuities, they may appoint to such daughters with a restraint on anticipation. If, on the other hand, the rule against perpetuities is to prevail, they cannot do so; that is, they cannot appoint the property to the daughters in such a way as to give them the actual benefit of it, though in the case of the sons they can do so. This is one instance of the inconvenience which follows from holding that a daughter in such a case cannot be restrained from anticipation during coverture.

Now it is remarkable that the decision of Lord Cottenham in *Thornton* v. *Bright* seems to have been to the other effect. The point, I agree, was not argued, but we cannot imagine that the very eminent counsel who argued the case, and the very eminent judge who decided it, overlooked the point. And in *Fry* v. *Capper*, where there was an appointment under a marriage settlement to a daughter for her separate use, without power of anticipation, Lord Hatherley, when Vice-Chancellor, in referring to *Thornton* v. *Bright*, said, "The appointment was decided by Lord Chancellor Cottenham to be a valid exercise of the power. Therefore, independently of principle, it would be difficult for me, after that decision, to hold this appointment to be bad." Lord Hatherley accordingly held that the appointment was not void as fettering the property beyond the legal limits, but that the restraint on anticipation might alone be rejected. Since those cases there have been further decisions with which I am not satisfied, but which, nevertheless, sitting here as a judge of first instance, I am not at liberty to disregard. The point came before Vice-Chancellor James in *In re Teague's Settlement*, Law Rep. 10 Eq. 564.[1] There a widow, who had

[1] This case will be found p. 722, *post*. — Ed.

under her marriage settlement a power of appointment amongst the children of the marriage, executed the power by giving a share of the settlement fund to a married daughter for her separate use, without power of anticipation, and the Vice-Chancellor held that the restraint on anticipation only was void, but that the remainder of the appointment was good. I must say the Vice-Chancellor's judgement is very unsatisfactory to me, because he gives no reasons, and he does not consider what the effect of a restraint on anticipation is.

It was argued by Mr. Hardy that the restraint on anticipation was good, and he says, "It cannot be said that the rule would have been infringed if Mrs. Teague had put this restraint upon her daughter for twenty-one years and no more; then what reasonable ground is there for not extending the protection to the daughter throughout her married life?" He must have meant by that what I have already expressed, that the object of the restraint was to give the daughter the actual benefit of the appointment. Then the Vice-Chancellor, after referring to *Fry* v. *Capper* as a decision in point, says, "I think it is impossible to hold that the rule against perpetuities can be abrogated in the way which has been suggested."

That is practically the whole of the Vice-Chancellor's judgment. The answer to that is, You do not want to abrogate the rule; the question is, whether the restraint on anticipation is not an exception, not merely to the particular rule, but an exception along the whole line, so to speak. The Vice-Chancellor really gave the go-by to the point.

Then the point came before Vice-Chancellor Malins in *In re Cunynghame's Settlement*, — the same point exactly. There, under a marriage settlement, the husband appointed the fund to the separate use of a married daughter, with a restraint on anticipation, and it was held that the appointment to the separate use was valid, but that the restraint on anticipation was void as being too remote.

Now all the Vice-Chancellor says is this: "I am of opinion that, upon principle, this is an invalid exercise of the power so far as it restrains alienation." Then, after referring to the authorities I have already mentioned, he says, "I should have arrived at the same decision in the absence of authority, but the cases I have referred to confirm me in the opinion that the restraint on alienation is not within the power." The whole argument of his judgment was, that it was a restraint which might extend beyond the limit, and was therefore void, but he did not consider whether, though extending beyond the limit, it was not an exception to the general rule. Therefore he really did not consider the point at all.

Then the last case is that of *In re Michael's Trusts*, before Vice-Chancellor Hall, who referred to a *dictum* of Lord Romilly's in *Armitage* v. *Coates*, and his only judgment, as reported, was that he thought *Armitage* v. *Coates* applied to the case before him, and made the order as prayed.

So that not one of the judges appear to me to have considered the real point, namely, whether a restriction on alienation, such as there is in the present case, is valid. I cannot, however, do otherwise than follow their decisions, though but for them my judgment would have been to the opposite effect, but I think the point is open for the Court of Appeal.

The order will, therefore, be as prayed.

HERBERT *v.* WEBSTER.

CHANCERY DIVISION. 1880.

[*Reported* 15 *Ch. D.* 610.]

SPECIAL case under the Statute 13 & 14 Vict. *c.* 35. By an indenture made on the 31st of December, 1874, Sarah Sharpe (who died in 1876) and John Sharpe (who died in December, 1879), who had at the date of the deed been married many years, and had two children living, viz., the plaintiff Emily Herbert, the wife of William John Herbert (a defendant), and Hannah Martha Mary, the wife of Edward Horsfall Mottershead (both defendants), assigned unto two trustees, their executors, administrators, and assigns, a sum of £2000 upon trust to receive and invest the same in the manner therein mentioned, and to pay and apply the interest, dividends, and income of the securities representing the same in the manner therein mentioned, during the lives of the said Sarah Sharpe and John Sharpe, and the survivor of them: and it was declared that after the death of Sarah Sharpe, and the failure or determination of certain trusts declared in favor of John Sharpe, which trusts determined upon his death, the trustees should stand possessed of the trust moneys and securities and the income thereof upon trusts for the benefit of the children of Sarah Sharpe by the said John Sharpe as the said Sarah and John Sharpe should, by deed jointly, or as the survivor of them should by deed or will or codicil appoint: and the deed provided that, in default of appointment, the trust moneys and securities and the income thereof should be held "in trust for all the children or any the child of the said Sarah Sharpe by the said John Sharpe who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, or if more than one in equal shares, but if daughters for their sole and separate use free from the control and debts of their present or any future husband, and so that during their present or any future coverture they shall have no power to alienate or anticipate the same or any part thereof." The indenture contained provisions for the advancement and maintenance of any "child or other issue of the said marriage."

The two daughters, at the date of the deed, were both married, and there were no more children living.

The power of appointment reserved to the wife and husband jointly, and to the survivor, was never exercised.

The question submitted for the opinion of the court was whether the two daughters were now entitled to the trust moneys and securities in equal shares for an absolute interest and free from the restraint on anticipation.

P. B. Lambert, for the plaintiff.

G. W. Lawrence, for the trustees, defendants.

Jason Smith appeared for the other defendants.

HALL, V. C. The authorities differ upon the question raised in this case. The decision of Vice-Chancellor Wood I consider to be an authority in favor of the restraint on anticipation, certainly as to those persons who were *in esse* at the date of the settlement or death of the testator, and in the case before Vice-Chancellor Wood it was the death of the testator. Some of the children of Isaac Lawrence, the person named in the will, being then born, the Vice-Chancellor said he saw no reason why they should not be restrained from dealing with their aliquot shares, which could be and were ascertained in amount at the death of the testator. That being so, there was no reason, in regard to perpetuity, why the share in that case should not be settled. There was no question of convenience, or as to the division of the fund, or otherwise, which required the court not to give effect to what was directed in regard to the other shares. It could not be disputed that if the testator had said, as to any of such children born in his lifetime, their shares, as to separate use, should be subject to restraint on anticipation, it would have been so held. Why should there not have been a gift such as that? There would have been nothing illegal in it, and nothing which transgressed the rules against perpetuities. Why should not the court give effect to what the testator said? I consider the decision ought to be followed, unless there be authorities subsequently to it which I must follow. The authorities, which are subsequent, are the case of *In re Michael's Trusts*, 46 L. J. (Ch.) 651, before me, and the case of *Buckton* v. *Hay*, 11 Ch. D. 652, before the Master of the Rolls. The case before me is very shortly reported. The point that some of the children were actually born before the testator died does not appear to have been drawn to the attention of the court, and it is only by referring to the dates that I can collect how the facts stood, and then only by looking at the dates of the marriages and the date of the death of the testator. He died in 1854, and the child who applied to the court was married in 1853, therefore before the death of the testator. She was living at the testator's death, and at the time when his will came into operation. It seems to me that the decision in that case is unsatisfactory. In *Buckton* v. *Hay* the Master of the Rolls appears to have thought that such trusts ought to be considered as outside the rules against remoteness, and as not affected by them. I think that I am in

a position to follow the decision of Vice-Chancellor Wood in *Wilson* v. *Wilson*, 4 Jur. N. S. 1076, and therefore I answer the question submitted by holding that the shares of the two daughters are subject to restraint on anticipation. The costs of all parties must come out of the fund.

SECTION IV.

ESTATES TAIL.

GOODWIN *v.* CLARK.

KING'S BENCH. 1661.

[*Reported* 1 *Lev.* 35.]

EJECTMENT and special verdict. A settlement was in consideration of marriage, and £1000 (paid) for the use of the husband for life, remainder to his son in the usual manner, and if he (the husband) should die without issue male, to the use of the daughters for a term for raising £1500 for their portions. The husband left a son and a daughter, and afterwards the son died without issue, whereby the lands remained over to another, according to the settlement, and the daughter brought ejectment. This case had been adjudged two several times before in several courts, the one time for the plaintiff, the other for the defendant; and the sole question was, If the husband leaving a son, who after dies without issue, whether the husband shall be now said to die without issue male within the intent of the settlement, so that the term should arise to the daughter? For 't was said for the defendant, that he did not die without issue male, for that he left a son, though this son afterward died without issue; and the intent of the settlement was well satisfied by the leaving of a daughter in satisfaction of the portion: but it cannot be intended, that when, or at what time whensoever, the issue male fails, the daughters should have portions, for that may happen 100 years after, when the sons are dead, and so no benefit or advantage to the daughters. 'T was also said to be ill in the creation, if it should be so intended to arise at such a distance of time, viz., whensoever there should be a failure of issue male. But to this it was answered, that whensoever the issue male fail, the husband is said to be dead without issue. 8 Co., *Bulmer's Case*, and 38 E. 3, 26 Dyer, 4 and 349, were cited to this purpose. And as to the benefit or advancement of the daughters, it was said, that this expectation is an advantage for them to be advanced in marriage: and as to the creating of the term, it was said, that a term may as well be created to arise upon a failure of issue male, as a power to sell on the failure of issue male, which hath been adjudged good in the case of *Vincent and Lee*, in

Moor. Rep. 147 ; 3 Cro. 26 ; 1 Leon. 285 ; 3 Leon. 106 ; Co. Lit. 113 *a*. And as to the objection of a perpetuity, it is nothing, for the son, who had the estate precedent, might bar it by a common recovery. And of this opinion were all the Court, except MALLET. And after divers arguments at the bar by *Serjeant Nudigate* for the plaintiff, and *Wylde*, the King's serjeant, for the defendant in this term, and in Michaelmas Term following, by *Aleyn* for the plaintiff, and *Kittlewel* for the defendant, and in Easter Term, 14 Car. 2, by *Finch*, the King's solicitor, for the plaintiff, and *Jones* for the defendant; judgment was given in Easter Term, 14 Car. 2, for the plaintiff.

NICOLLS *v.* SHEFFIELD.

CHANCERY. 1787.

[2 *Bro. C. C.* 215.]

WILLIAM TRAFFORD, by his last will and testament, bearing date the 10th of February, 1758, duly executed for passing freehold estates, devised all his moiety of the manor of Heaton, in the county of Stafford, and all that his capital messuage called Swithamley Grange, and other estates in the counties of Stafford and Chester, to Edward Sykes and John Birtles, and their heirs, upon the trusts following, viz. to the use of his daughter Sarah Nicolls for life, with remainder to the use of Samuel Nicolls, third son of the said Sarah, for life, remainder to trustees to support contingent remainders, remainder to the first and other sons of the said Samuel Nicolls successively in tail-male, remainder to the use of Edward Nicolls, (the plaintiff's father,) fourth son of his said daughter Sarah, for life, remainder to the said trustees to support contingent remainders, remainder to the first and other sons of the said Edward Nicolls successively in tail male, remainder to Robert Nicolls, fifth son of his said daughter Sarah, for life, remainder to the trustees to support contingent remainders, remainder to the first and other sons of the said Robert Nicolls successively in tail male, remainder to his own right heirs.

Thomas Nicolls, late of Whitchurch, in the county of Oxford, made his last will and testament, bearing date the 11th of June, 1776, whereby he devised unto the defendants, the Reverend William Sheffield, clerk, and George Vernon, and to their heirs, executors, &c. all his freehold and leasehold lands in Whitchurch aforesaid, and elsewhere in the county of Oxford, and also all such money as should be due to him on government or private securities, and all such money as he should die possessed of and as should be due to him for rents, and all other accounts (except as thereinafter mentioned), in trust, to sell all his freehold and leasehold estates in the said county of Oxford, and out of the money

arising therefrom, and from other his personal estate, to pay all such debts as should remain due and owing from his late uncle, the Reverend Samuel Walker, clerk, deceased; as also all such debts as he should owe at his decease, and his funeral and testamentary expenses, and the several legacies by him thereinafter given and bequeathed. The testator then devised unto the said William Sheffield and George Vernon, and their heirs, all his freehold estates in the county of Stafford, or elsewhere in the kingdom of Great Britain, (before unbequeathed) upon the trusts, and to, for, and upon the uses following, viz. in trust to receive and take the rents and profits thereof to pay debts, &c. in aid of the Oxfordshire estates, if they should not be sufficient, and subject thereto; in trust to pay an annuity of £60 to his brother Robert Nicolls, and some other annuities, and to raise sums of £500 each for certain nephews and nieces of the testator: and, subject thereto, to pay the overplus rents and profits of my last devised freehold estates unto my said brother Edward Nicolls (the plaintiff's father) for and during the term of sixty years (to be computed from the day of my death), if the said Edward Nicolls shall so long live (subject to the proviso hereinafter mentioned relating thereto); and from and after the expiration of the said term, or the decease of the said Edward Nicolls, which shall first happen, then my said trustees, and their heirs, shall stand seised of my said last devised messuages, lands, tenements, and hereditaments, subject and charged as aforesaid, to the use of the first son of the body of the said Edward Nicolls to be begotten, and the heirs of the body of such first son lawfully issuing (subject to the proviso hereinafter mentioned); and in default of such issue (subject and charged as aforesaid), to the use of the second, third, fourth, and all and every other the son and sons of the body of the said Edward Nicolls to be begotten &c., and in default of such issue, then to pay the overplus rents and profits of my said last devised messuages or tenements, lands and hereditaments, unto my said brother Robert Nicolls, for and during the term of fifty years, to be computed from the day of the death of the said Edward Nicolls, if the said Robert Nicolls, my brother, shall so long live (subject to the proviso hereinafter mentioned); and from and after the expiration of the said term of fifty years, or the decease of my said brother Robert Nicolls, which shall first happen, then my said trustees shall (subject and charged as aforesaid) stand seised of my last devised messuages, lands, tenements, and hereditaments, to the use of the first son of the body of the said Robert Nicolls, my brother, begotten or to be begotten, and the heirs of the body of such first son, lawfully issuing (subject to the proviso hereinafter mentioned); and in default of such issue (subject and charged as aforesaid), to the use of the second, third, fourth, and all and every other the son and sons of the body of the said Robert Nicolls, my brother, begotten or to be begotten, &c. with other remainders over. Provided always, and my express will and meaning is, in case my said brother Edward Nicolls, or the heirs of his body, or my said brother Robert Nicolls, or the heirs of his body, shall become

seised of the estates of which my late grandfather, William Trafford, Esq. died seised, either by virtue of or under his will, or by any other ways or means whatsoever, that then and from thenceforth the trusts hereby declared, of the last devised messuages, lands, tenements, and hereditaments, for the use and benefit of such person and persons as shall so become seised, shall, from the time of his, her, or their becoming so seised, cease, determine, and be absolutely void; and my said trustees and their heirs shall immediately afterwards stand seised of my last devised messuages, lands, tenements, and hereditaments, to and for the use and benefit of the person or persons next in remainder, by virtue of this my will, and in such and the like manner as he, she, or they would be entitled thereto, in case the person or persons so seised of my grandfather's estates was or were actually dead, anything herein contained to the contrary notwithstanding.

Thomas Nicolls died in 1782: the trustees in his will took possession of his estates; and all his and his uncle's debts being paid, were seised thereof to the use of Edward Nicolls, the plaintiff's father, for the term of sixty years, if he should so long live.

William Trafford died in 1765; and by virtue of his will, Sarah Nicolls, his daughter, entered upon the estate devised to her for life: she died in 1785, and Samuel Nicolls, the second devisee, having died in 1783, Edward Nicolls, the father of the plaintiff, became entitled for life to the estate devised by William Trafford.

Upon Edward Nicolls, the plaintiff's father, coming into possession of this latter estate, the plaintiff, the 13th of May, 1786, filed this bill, stating himself to be the eldest son of the said Edward Nicolls, and insisting that the defendant Edward Nicolls, being in possession of the estate devised by William Trafford, his estate and interest in the estate devised by Thomas Nicolls was determined, and that he, as being the next person in remainder in Thomas Nicolls's will, was become entitled to that estate.

The question was as to the validity of the proviso.

Mr. Scott, for the plaintiff, only stated the proviso, and that under it the plaintiff was, he said, entitled as next person in remainder to the Nicolls estate.

Mr. Coke, for the defendant, Edward Nicolls the father, argued, that the proviso was illegal, and tended to render the estate unalienable longer than the rules of law will permit; that in this respect it had some analogy to the case of *Perrin* v. *Blake*.

Mr. Price, for Robert, contended he was the next person in remainder.

Master of the Rolls. [Sir Lloyd Kenyon.] There is no doubt with respect to the validity of the proviso: several estates are held under similar limitations. No rule of law is contradicted by it; and if no recovery was suffered, it might take place at any distance of time. I might as well be told that an estate tail is an illegal estate, because it may endure forever, and must, where the remainder is in the

Crown. I am clearly of opinion, that, in the event which has happened, Edward Trafford Nicolls is entitled to an estate tail in possession in the premises devised by Thomas Nicolls's will, subject to the charges.

Decree for the plaintiff.

BRISTOW *v.* BOOTHBY.

CHANCERY. 1826.

[*Reported* 2 *S. & St.* 465.]

By Sir Brooke and Lady Boothby's marriage settlement, certain freehold estates, the property of the lady, were settled on Sir Brooke Boothby for life, with remainder to Lady Boothby for life, with remainder to trustees for 500 years, for raising portions for the younger children of the marriage, with remainder to the first and other sons of the marriage in tail male, with remainder to certain other trustees, for a term of 1,000 years, to raise portions for the daughters in default of issue male of the marriage, with remainder to the first and other sons of Lady Boothby, by any after-taken husband, in tail male, with remainder to the daughters of Lady Boothby, equally, as tenants in common in tail, with remainder to the survivor of Sir Brooke and Lady Boothby in fee: and it was provided that, in case there should not be any child or children of the marriage, or, there being such, all of them *should die without issue*, and Sir Brooke should survive Lady Boothby, then it should be lawful for Lady Boothby, by deed or will, whether she should be covert or sole, and notwithstanding her coverture, to charge the premises with £5,000, to be raised and paid, after the decease of Sir Brooke and Lady Boothby, and such failure of issue as aforesaid, to such person as Lady Boothby should direct, and to create a term of years for the better raising of such sum of money.

There was only one child of the marriage, who died at the age of eight years.

Lady Boothby died in the lifetime of Sir Brooke, having, by her will, executed the power of charging the settled estates with the £5,000.

The present suit was instituted, by a person claiming under that will, against the heir of Sir Brooke Boothby, for the purpose of giving effect to that charge. The defendant put in a general demurrer.

Mr. Tinney and *Mr. Coote*, in support of the demurrer.

Mr. Sugden, in support of the bill.

Mr. Sclater, with *Mr. Sugden*, relied on *Morse* v. *Lord Ormonde*, 5 Madd. 99.

THE VICE-CHANCELLOR. [SIR JOHN LEACH.] In that part of the instrument which creates the power, the clear expressed intention is, that it shall only take effect upon a general failure of issue of the marriage; and there is no language, in any other part of the instrument, which

can authorize a court to state that this was not the real intention of the parties. There can be no doubt that, if it had been pointed out to the parties that the estate was not limited to all the issue of the marriage, and that the power expressed was, therefore, too remote, the deed would have been altered, and that the power and the limitations to the issue would have been made to correspond. But there is nothing in this instrument which enables me to say whether this would have been effected by extending the limitation to the sons in tail general, or by directing that the power should arise upon the failure of the particular issue of the marriage, who were inheritable under the settlement, as it is now framed. I am compelled, therefore, to construe the deed as I find it, and to say that the event upon which the power is to arise, being too remote, the demurrer must be allowed.[1]

SECTION V.

POWERS.

NOTE. — See the last case under the preceding section, *Bristow* v. *Boothby.*

ROUTLEDGE *v.* DORRIL.

CHANCERY. 1794.

[*Reported* 2 *Ves. Jr.* 357.]

On the marriage of Richard Dorril and Elizabeth Harcourt, one moiety of the manor of Nutting Barnes and other premises at Kensington, and one moiety of £2150 Old South Sea Annuities were conveyed and assigned on trust to be sold; and that the produce with £5500 Bank Annuities transferred by Richard Dorril to the same trustees should be possessed by them on trust as to the Bank Annuities for the husband for life; after his decease for the wife for life; and after the decease of the survivor, if there should be any issue of the marriage, to pay, divide, and distribute, assign, or transfer, the said trust premises, or the securities, unto and among all and every the children, and grandchildren, or issue, of the said intended marriage, if there should be more than one, in such shares and proportions, and under such restrictions, limitations and conditions, and at such time and times, and in such manner and form, as Richard and Elizabeth Dorrill by any deed or deeds, writing or writings, to be by them duly executed in presence of two or more credible witnesses should from time to time, or at any time or times during their joint lives, direct and appoint; and for want of such appointment, unto and among all and every the children, and

[1] See *Lancsborough* v. *Fox*, Cas. temp. Talb. 262 (1733).

grandchildren, or issue, of the intended marriage, if more than one, in such shares and proportions, and under such restrictions, limitations, and conditions, and at such time, and times, and in such manner and form, as the survivor should from time to time, or at any time or times, by any deed or deeds, writing or writings, executed as aforesaid, or by his or her last will and testament, give, declare, direct or appoint; and for want of such appointment, for all and every the children, and grandchildren, or issue, of the marriage, if more than one, which should be living at the decease of the survivor, equally to be divided among them, share and share alike; payable to the sons at twenty-one; to the daughters at twenty-one or marriage; provided, that in case of no appointment by Richard and Elizabeth Dorril, or the survivor, the issue of any child or children dead should not have any greater or other share, than the parent or parents of such children or issue, if living, would have been entitled to; and if there should be but one child living at the decease of the survivor, for such only child, with power for maintenance and education of the children or issue of the marriage in case of no appointment; and as to the produce of the said moiety of the manor, &c. and of the moiety of the South Sea Annuities, to lay out the same in some of the public funds, upon the same trusts, for the same purposes, and subject to the same powers, applications, restrictions, and agreements; and in case of no child or issue of the marriage, or the decease of all before time of payment, upon other trusts.

The estates at Kensington were sold and a moiety of the produce was invested in the purchase of £3500 three per cent Bank Annuities upon the trusts of the settlement. The £1075 a moiety of the £2150 South Sea Annuities was not transferred under the settlement; but remained vested in the original trustees.

Richard Dorril died in 1762 before any appointment, leaving his widow and four children by her, Richard, Elizabeth, Frances, and Mary, surviving.

In 1775, £300 part of the £5500 Bank Annuities was at the request of the widow, sold and applied in the advancement and for the use of Frances Dorril.

In 1776 in consideration of the marriage of John Edwards and Elizabeth Dorril the younger, her mother by the marriage settlement, executed according to her power, appointed £500 part of the £3500 Bank Annuities to her daughter Elizabeth immediately on her marriage, as part of her share in the same, to the intent, that her husband might receive the same and the dividends to his own use; and in consideration of the marriage, and to make some provision for John Edwards and Elizabeth Dorril and their issue, Elizabeth the elder by virtue of her power appointed £1000 other part of the said £3500 Bank Annuities to her daughter Elizabeth immediately after the decease of the mother to be transferred to trustees upon trust for John Edwards for life, in case he should survive Elizabeth Dorril the elder; and after his decease for his wife for life, in case she should survive him; and after the

decease of the survivor for all and every the child and children of the marriage in such shares and proportions, manner and form, upon such conditions, with such restrictions, and at such time and times, as John and Elizabeth Edwards or the survivor should appoint; in default of appointment, equally, with survivorship; and if there should be no children, or all should die, before they should be entitled, for the survivor of John and Elizabeth Edwards, his or her executors or administrators.

In 1775 Frances Dorril married Jonathan Twiss.

In 1782 Elizabeth Dorril the elder, by her will reciting her power, and the appointments, she had made, in pursuance of her power appointed, that £1000 a moiety of the £2000 remaining of the £3500 Bank Annuities should upon her decease be transferred to her executors upon trust for Elizabeth Edwards for her separate use for life; and after her decease to transfer the capital to and among all and every the child and children of Elizabeth Edwards by her then or any future husband in equal shares and proportions, if more than one; if but one, to such only child, payable to the sons at twenty-one, to the daughters at twenty-one or marriage, with survivorship; and in case Elizabeth Edwards should leave no children by her then or any future husband living at her death, or all should die before twenty-one or marriage, the testatrix appointed the said £1000 to her son Richard and her daughter Mary Dorril, their executors and administrators, in equal shares. She farther appointed, that £500 part of the £5200 remaining of the £5500 Bank Annuities should upon her decease be transferred to her executors upon trust for her daughter Frances Twiss for life for her separate use; and after her decease to transfer the capital to and among all and every the children of Frances Twiss by her then or any future husband in equal shares and proportions, if more than one, if but one, to such only child, payable to the sons at twenty-one, to the daughters at twenty-one or marriage, with survivorship; and in case she should leave no children by her then or any future husband, or they should die before twenty-one or marriage, the testatrix appointed the £500 to Jonathan Twiss, his executors and administrators. She farther appointed the £1000 remaining of the £3500 Bank Annuities and £1000 of the £4700 remaining of the £5500 Bank Annuities upon her decease to Mary Dorril for life for her separate use; and after her decease to and among all and every her children by any husband in equal shares and proportions, if more than one, if but one, to such only child, payable to the sons at twenty-one, to the daughters at twenty-one or marriage, with survivorship; and in case she should leave no children, or they should die before twenty-one or marriage, to Richard Dorril, his executors and administrators.

The testatrix farther appointed the £3700 remaining of the £5500 Bank Annuities and the £1075 South Sea Annuities upon her decease to Richard Dorril for life, but with full power in case of his marriage to make a settlement of the said stock or any part of it upon his wife,

and the issue of such marriage: and after his decease in case of no settlement, or as to such part, as should not be settled, to and among all and every the child and children of Richard Dorril in equal shares and proportions, if more than one, if but one, to such only child, at such ages and times, and with the same benefit of survivorship, as were mentioned with respect to the children of the testatrix's daughters: but in case Richard Dorril should leave no children at his death, or all should die, before they should be entitled, to Richard Dorril, his executors and administrators.

The testatrix died in 1791 leaving all her children surviving, and three children of Mrs. Edwards her only grandchildren.

The bill was brought by the executors to have the usual accounts taken, and the rights of the parties in these trust funds ascertained.

The general question was as to the validity of these appointments; out of which several points arose: first, if the interests given to grandchildren were void as to those not living at the death of the testatrix, whether those then living could take; and whether the appointment to Richard and his children could be executed upon the doctrine of *cy pres:* secondly, whether the preceding interests being void, the subsequent limitations to the children, who were good objects of appointment, could be accelerated: thirdly, how what was ill appointed should be disposed of; if as in default of appointment; fourthly, whether the children of Mrs. Edwards could claim under the proviso, that in case of no appointment the issue of any child deceased should not have a greater share, than the parent would have taken.

Master of the Rolls. [Sir Richard Pepper Arden.] This cause has stood a considerable time for judgment; the parties having thought fit to request, that instead of making a case for a court of law, which I think would have been the proper mode, and which I am very sorry I did not adopt, it might be determined here; and thinking, that as it was a family affair, it might be decided with less expense, and in a more summary way, they have pressed, that I would in consequence of the certificate in *Griffith* v. *Harrison*, in which the Court of King's Bench was divided, give my opinion upon it without referring it to a court of law. I have found more difficulty, than I apprehend had occurred either to the parties or the counsel; and it has been so perplexed in the manner, in which it was brought forward, by a confusion of separate and clashing interests, that this case has not been argued, as a case involving such a number of questions might have been expected to have been argued. It seems to me to be a case, that involves almost all the questions, that have for a long time agitated the courts as to executions of powers both at law and in equity. There is no doubt, that under this power it was competent to the parties to have appointed among all the issue living at the death of either the husband or wife, whether the first, second, or third, degree: and though the words are not confined to grandchildren living at the death, yet as they might appoint to such, as were then living, such appointment would be good. The

first question is, whether the appointment made on the marriage of Elizabeth Dorril the daughter is good within the power and the rules of law, being an appointment in consideration of the intended marriage of the daughter of a certain portion of that, of which the daughter might have been made the appointee; but settling that so as to give interests to persons, who would not have been objects of a direct appointment: but I am of opinion, that wherever there is a power to appoint among persons capable of such appointment, and they come *in esse* at the particular times to make the appointment good, a sum appointed, as in this case to the daughter, upon marriage, though modified with respect to the objects of the marriage, is a good appointment, not to the objects of the marriage, but to the daughter herself; and this appointment is a good appointment to her; though if it had been done by will, and independent of any modification introduced by Elizabeth the daughter, it would not have been good; because the husband, and the children of the marriage born after the death of their grandmother, were not immediate objects of appointment. Therefore it is just as if it was appointed to her, and she had settled it so with the husband. So far there is not much doubt: but upon the subsequent appointments made by the mother there is not only great doubt; but all the doubts, that have ever occurred arise; and I am very sorry now to have to determine it without sending it to law. There is no doubt, that under the words of the original power any issue of the intended marriage living at the death of the husband or wife would have been competent to receive a share; and there being three children of Elizabeth Edwards living at the death of Elizabeth Dorril, if she had appointed to them, without doubt they might have taken. But she has appointed to Mrs. Edwards for life; and instead of giving it to such of her children, as should be living at the death of their grandmother, she has given to all the children, her daughter might have during her life. Those that may be born after the death of their grandmother, cannot be included among those, in whose favor the power may be executed; and the question is, whether those children, who might have been the proper objects, shall take. At first I was of opinion, that as she might have appointed to the three children born before her death, when she appointed to all, these three might be considered as the sole objects: but upon considering it farther, and particularly upon *Gee* v. *Audley*, I am of opinion, that would be a forced construction; and that the grandmother in affecting to give this to all the issue her daughter might have at any time, has transgressed the power; and so far being ill executed it is to be considered as not executed, and is totally void.

The appointment to Mrs. Twiss and her children, and for want of children to her husband, falls into the same predicament. She affects to give part of this, which must be confined to the children living at her death, to all the children, her daughter may ever have.

As to the appointment to Mary Dorril and her children, from what I have said it is clear, the children of Mary being children unborn at the

death of their grandmother, it is void as to them: but if there are no children, it is given over to Richard Dorril; and he, if it was given immediately to him, would have been entitled to receive it; and then the question in *Alexander* v. *Alexander*, 2 Ves. 640, and *Robinson* v. *Hardcastle*, 2 Term Rep. B. R. 241, arises: whether, the intermediate appointment being bad, the subsequent appointment shall be accelerated. I agree with Sir Thomas Clarke and Mr. Justice Buller, that though the children substituted immediately after the first gift for life are incapable of taking, they will prevent it from going over; and that it would be monstrous to contend, that though it is appointed to Richard Dorril in failure of the existence of persons incapable of taking, yet notwithstanding they exist, he should take, as if it was well appointed to them, and they had failed. It is given upon a contingency, upon which there was no right to give it. It has been asked, if there are no children, why should he not take it? I think Lord Kenyon is right in *Gee* v. *Audley*. The bill was dismissed; and in the Register's book there is no state of the case; but I have been furnished with a note of it by Mr. Cox. One question was, whether the court would wait to see, what contingency would happen, when at the time it was given at a period more distant, than the law would permit. I agree with Lord Kenyon, that it is absolutely void in that case; and every affectation of giving it over upon that contingency is equally void.

There is no doubt as to the appointment of £300 to her daughter Frances.

As to the appointment to Richard Dorril the son for his life, there is no doubt as to that; but as to the subsequent appointment of the fund, when it is clear, that it was intended to go to his children, but if there should be no children, then to himself, and he being capable of taking the whole immediately, though his children cannot take, I must feel great reluctance in declaring, that all this disposition in favor of Richard Dorril after his life interest is void; but I am under the necessity of so doing. It is contended, and that is the great difficulty, that if the children cannot take, upon the doctrine of *Pitt* v. *Jackson*, the intention is to be executed *cy pres*; and if it cannot be executed in the manner, in which the party has endeavored to do it, the court will substitute some other mode, by which it may take effect. I know, the doctrine in that case has by very great authorities been questioned. Lord Kenyon allowed it there; and in a similar case *Griffith* v. *Harrison* he has adhered to it, and was followed by Mr. Justice Grose. The other judges did not negative that; but thought, an estate for life only passed for other reasons. In *Bristow* v. *Warde*, 2 Ves. Jr. 336, the Lord Chancellor avoided giving any opinion upon that. I subscribe to the case of *Pitt* v. *Jackson*, as far as it was decided with regard to a real estate settled to a person, who was an object of the power, for life, with limitations in strict settlement to persons not objects of the power: for that was decided in *Humberston* v. *Humberston*, 1 P. Will. 332, and *Spencer* v. *Duke of Marlborough*, 5 Bro. P. C. 592, but I cannot apply that

to personal property. *Pitt* v. *Jackson* was a case of real estate. The first and other sons were incapable of taking as purchasers: Lord Kenyon thought, that as it was perfectly clear, it was intended to go to the daughter and her issue, and they could not take as purchasers, to effectuate the general intention of the testator it should be so moulded: and he relied upon *Chapman* v. *Brown*, 3 Burr. 1626, I admit, and I remember attending the argument of that case in the Court of King's Bench, and in the House of Lords, that it was not decided in the latter upon that point. Lord Parker took advantage of the omission of a line. They did seem to avoid giving an opinion upon that point. But it is equally clear according to the report, that Lord Mansfield laid down that doctrine, and I do not find much objection to it, viz. that where there is a limitation for life to a person unborn with remainders in tail to the first and other sons, as they cannot take as purchasers, but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person to whom it is given for life. This is personal estate, first given for life to the parent, an object of the power, then equally, or as he shall appoint, to the children, who are not objects of the power. I am desired to execute that *cy pres*. How can I do that? To effectuate such intention I can only give it to him absolutely: and then it would not go in a course of descent; but would go to his executors, and be liable to his debts. In the case of real estate it is true, the law enables the party to defeat the estate tail: but an act must be done by him for that. If he dies without doing that act, the estate goes to his issue. But that is not the case as to personal estate. If I declare him entitled absolutely, his children would not succeed in any manner intended by his mother; but it would go to his executor. Therefore this doctrine cannot apply to such a subject.

Then the issue of these several tenants for life are incapable of taking except the issue of Mrs. Edwards, who cannot take except under the marriage settlement; because by the will Elizabeth Dorril has given to all generally, not to those, who should be alive at her death; and if *Gee* v. *Audley* is right, I cannot give it to them in any limited way. That case was on the 14th February, 1787. There was an appointment by will of £1000 in default of issue of Mary Hall equally to be divided between the daughters then living of John Gee and Elizabeth his wife; and if that had been restrained to the death of the person executing the power, it would have been good. The bill was brought by the four daughters of John and Elizabeth Gee to have the fund secured for their benefit upon the death of Mary Hall without issue. It was contended, that it was too remote. Lord Kenyon said, that neither real nor personal can be so settled as to be tied up beyond lives in being and twenty-one years and a few months afterwards; that if the expression in that will had been "daughters now living," or "living at my death," it would have been good: but that as it stood, it might be to those born afterwards; which was settled by *Ellison* v. *Airey*; therefore it was

bad, because intended to take in after-born children. Applying that to the present case, if that is right, and I think it is, it decides this. This testatrix had power to appoint among grandchildren or the issue of grandchildren; but provided they were living at her death; for otherwise it would be tying it up beyond the limits. She has given estates for life to her different children; and after their deaths the principal, not to those born during her life, of which there were none, but the children of Mrs. Edwards, but to all. Then it is said, if all Mrs. Edwards's children cannot take, why may not those, to whom she might have appointed? I answer, because she did not mean those only, but all; and upon failure of all, then, and then only, she gave it over. Therefore upon the whole on the principles, I have laid down, I am of opinion first, that the settlement upon the marriage of Elizabeth is good as an appointment to her; next, that every gift to the issue of any of the children not living at the death of the testatrix is void; but that it is sufficient to prevent the gift over to the objects of the appointment, to whom it is given in failure of them. Therefore the children can only take for life under the appointment; and then the remainder is to be divided, as if no appointment had been made.

Then comes a very extraordinary case upon the proviso, that in case of no appointment the issue of any child shall have only the share of its parent. There are three children of a living parent. Being born in the life of their grandmother they are objects of the appointment; and might have had shares appointed to them: but not being made objects of it, if their mother had been dead, they would have taken her share. But as she is alive, it is impossible to hold, that a child having a living parent can take any share; though it is clear, they might have been made substantive objects of the appointment. Therefore I declare the appointment, so far as it is executed in favor of any of the issue of the marriage not living at the death of Elizabeth Dorril the survivor, is void; and such parts of the fund remain undisposed of; and are to be distributed. The consequence is, they will go equally among the surviving children, Mrs. Edwards, her brother and two sisters.

A question might arise, how far an unborn child is to be made tenant for life; but it is established upon good principles in precedent certainly, that that may be. The doubt was, whether it was not tying up the estate beyond lives in being and twenty-one years afterwards: but that is not so, where the absolute interest is disposed of, and vested, though part is given for life; for that person with the person having the absolute interest may dispose of the estate. It is not unalienable.

BRAY *v.* BREE.

HOUSE OF LORDS. 1834.

[*Reported* 2 *Cl. & F.* 453.]

THE LORD CHANCELLOR.[1] [LORD BROUGHAM.] My Lords, this appeal from a decision of the *Vice-Chancellor* [*Sir Launcelot Shadwell*] raised a question of considerable nicety, although now, on a further consideration of it, I entertain very little doubt as to what your Lordships' judgment ought to be. The nature of the case, rather than any great difficulty that I experienced in making up my mind to advise your Lordships on it, has given rise to the intention I have of entering into the circumstances somewhat more at large than I otherwise might have done in a case where I saw no reason to differ from the court below.

Upon the marriage of Broad Malkin and Elizabeth Spode, by a settlement then made, the sum of £8000, secured by bond, was vested in trustees, subject to the joint appointment of the husband and wife among the child or children of the marriage. I need not state the terms of that power of appointment, as the question arises not upon that, but upon the several appointment of the wife, she surviving her husband: which was in exactly the same terms, word for word, as the power of appointment given to the two jointly. The fund was to be in trust for all and every the child and children of Elizabeth Spode, by Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, and subject to such conditions, restrictions, and limitations over the same (to be always for the benefit of some one or more of such child or children), as the said Elizabeth Spode alone, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, to be by her signed and published in the presence of and to be attested by the like number of witnesses, should direct or appoint. The settlement then goes on to provide for the case of there being neither a joint appointment by the husband and wife, nor a several appointment by her, in execution of the power; in which event it provides for the transfer of the fund of £8000 to the child and children, if more than one, share and share alike, at certain ages mentioned.

Mrs. Malkin survived her husband, having but one child, Saba Eliza Malkin, and she executed the power to that daughter; she, in effect, appointed, for she appointed under certain limitations "to such person or persons as she, the said Saba Eliza Bray, at any time or times, and from time to time, during my life, or after my decease, and not-

[1] The facts are sufficiently stated in the opinion. — ED.

withstanding her present or future coverture, should (in manner therein mentioned) direct or appoint." So that she gave Saba, her daughter, the power of appointment; and in default of that execution of the power, she then limited the fund in a way which it is unnecessary here to state. Saba Eliza, who was married to Mr. Bray, having afterwards appointed to her uncle William Hammersley, who has departed this life since the appeal was brought, the question arises between her husband and the appointee's representatives under Saba Eliza's execution of the power; which question is, whether she took an absolute interest in the £8000 under the original settlement, in which case the fund would belong to her husband, or whether she took under her mother's power of appointment. If she did not take under her mother's power of appointment, but took under the original settlement, in that case *cadet questio*. If she did take under her mother's power of appointment, the remaining question is whether she well executed that power given to her by her mother. I have no doubt that there is a good execution of the power in that case; but the question raised, as your Lordships may perceive, is twofold: first, whether the power under the settlement of 1805, and which Elizabeth Malkin, the mother, assumed to execute, was a power of appointing, in the event which occurred, to one child, or only a power of distribution, appointing among more than one child; that is, whether it was a power of appointment, or whether only, in effect, a power to ascertain the shares which several individuals should respectively take. That is the principal question, and the only one encumbered with the least doubt: on the other, that is, whether the power was well executed, I have not any doubt whatsoever. [His Lordship then addressed himself to the question whether the power given to Elizabeth Malkin authorized her, in the event of there being but one child, to appoint to that child, and he determined that it did. This discussion, which occupies all the rest of the opinion except the last paragraph, is omitted. That last paragraph is as follows: —]

My Lords, it was said that *Alexander* v. *Alexander*, 2 Ves. Sen. 640, touched a part of this case; *Folkes* v. *Western*, 9 Ves. 456, also was relied upon on the part of the appellant. Much doubt has been thrown upon that case at different times; it was said there was another point in that case decided, which had been wrongly decided; but my opinion is, that *Folkes* v. *Western*, as far as it applies to this case, is rather against than for the purpose for which it was cited. My Lords, I rely upon the reasons I have given independently of authorities, particularly the first, and above all that part of it on which I have thought it right to go into greater detail; for these reasons it appears to me that the present judgment is right, and I shall move your Lordships that the judgment of the court below be affirmed. I do not propose to your Lordships to give any costs in this case; it appears that the money went to the uncle of the wife, upon her death; the husband probably was advised that there was a serious question whether he was

not entitled to it; and I think, under these circumstances, your Lordships are not called upon to give costs.

Judgment affirmed, without costs.[1]

Mr. Preston and *Mr. William Russell*, for the appellant.
Sir Edward Sugden and *Mr. Knight*, for the respondents.

LANTSBERY *v.* COLLIER.

CHANCERY. 1856.

[*Reported* 2 *K. & J.* 709.]

A SPECIAL CASE.

William Manning, on the marriage of his daughter Elizabeth with one Lomas, in 1806, settled real estate, by indentures of lease and release of that date, to the use of James Manning and Samuel Tilley, and their heirs, for the joint lives of Lomas and Elizabeth, upon trust for the separate use of Elizabeth; and after the decease of Lomas, in case he should die in the lifetime of Elizabeth, (which event happened), to the use of Elizabeth and her assigns for her life, with remainder to the use of James Manning and Samuel Tilley during the life of Elizabeth, upon trust to preserve contingent remainders, with remainder after the death of Elizabeth, in case she should survive Lomas, to the use of the children of Elizabeth by Lomas or any after-taken husband, as tenants in common in tail, with cross-remainders between them in tail, with remainder to the use of himself, his heirs and assigns, forever. And it was by the indenture of release declared, that James Manning and Samuel Tilley, and the survivor of them, and the executors or administrators of such survivor, should at any time or times thereafter, at the request of William Manning during his life, to be signified in writing under his hand and seal, and after his decease it should be lawful for James Manning and Samuel Tilley, or the survivor of them, his executors or administrators, of their or his own proper authority, absolutely to sell and dispose of and convey the whole or any part or parts of the hereditaments and premises thereby granted, with the appurtenances, and the inheritance thereof in fee simple, to any person or persons whomsoever, for such price or prices in money as to William Manning, during his life, and after his decease as to James Manning and Samuel Tilley or the survivor of them, or to the executors or administrators of such survivor, should seem reasonable; and that, for the purpose of effectuating such sale or sales, disposition or dispositions, and conveyance or conveyances, (but not for any other purpose), it should be lawful for James Manning and Samuel Tilley, and the survivor of them, and the executors or administrators of such

[1] See *Mifflin's Appeal*, 121 Pa. 205 (1888).

survivor, upon such request of William Manning during his life as aforesaid, and after his decease of the proper authority of the said trustees or the survivor of them, his executors or administrators as aforesaid, by any deed or deeds, instrument or instruments in writing, sealed and delivered by them or him in the presence of and attested by two or more credible witnesses, absolutely to revoke, determine, and make void all or any of the uses, trusts, estates, powers, provisions, declarations, and agreements in and by the indenture of release limited, expressed, and declared of and concerning the hereditaments and premises which should be sold as aforesaid, (except the subsisting leases, if any such should then have been made by virtue of a power thereinbefore contained); and by the same or any other deed or deeds, instrument or instruments in writing, to limit, direct, declare, and appoint any new or other use or uses, estate or estates, trust or trusts of the hereditaments and premises so sold. The release also contained a power for James Manning and Samuel Tilley, and the survivor of them, and the executors or administrators of such survivor, to give receipts for the purchase-money, providing that such receipts should be sufficient discharges, in the usual form. And it was thereby declared, that, when the hereditaments and premises, or any part or parts thereof, should be sold, the moneys arising by such sale or sales should be by James Manning and Samuel Tilley, and the survivor of them, and the executors and administrators of such survivor, by and with the consent and approbation of William Manning during his life, and, after his decease, of Elizabeth alone, notwithstanding her coverture, to be signified by writing under his or her hand and seal, and after the decease of both William Manning and Elizabeth, then of the proper authority of the said trustees, or of the survivor, his executors, or administrators, laid out and invested as therein mentioned in the names or name of the said trustees or trustee, with power for them or him, with such consent and approbation as aforesaid, or of their own proper authority, as the case might be, to vary such investments. The release contained a declaration of trust of certain personal property, which was also settled by William Manning, and of the purchase-money to arise from a sale under the power, for the separate use of Elizabeth during her life, with remainder, in the events which happened, at the absolute disposal of Elizabeth by will.

Lomas died in 1813, leaving Elizabeth surviving, who did not marry again.

There was issue of the marriage two children only, Elizabeth who died in 1835, without having had any issue, and Mary, who died in 1834, having had issue one son, who died before 1850 under twenty-one, and without having been married. The estate tail was not barred by either of the daughters.

William Manning died in 1815. The trustees also died, and new trustees were appointed under a power for that purpose in the settlement.

In 1850, Edward Lantsbery, who was the then sole surviving trustee, contracted to sell the real estate to the plaintiff, and executed an indenture of that date, purporting to be made in exercise of the powers of revocation and of sale contained in the release of 1806, and to be a conveyance of the premises by Edward Lantsbery to the plaintiff in fee simple. At the date of this deed and of the contract for sale, Elizabeth, the tenant for life, was living, and was upwards of seventy years of age.

The plaintiff having afterwards agreed to sell the premises to the defendant, the latter objected to the title, on the ground, that, in 1850, there was not any power of sale subsisting under the settlement of 1806, which Edward Lantsbery could exercise so as to vest in the plaintiff the premises thereby expressed to be conveyed.

The questions for the opinion of the court were —

1st. Whether the power of sale contained in the indenture of release of 1806, of the hereditaments therein comprised, was a valid and subsisting power at the date and execution of the indenture of 1850, having regard to the events which had then happened; and if so, then,

2ndly. Whether such power was well exercised by the indenture of 1850, and whether the hereditaments comprised in such indenture were thereby effectually vested in the plaintiff for an estate in fee simple, discharged from the limitations of the indenture of release of 1806.

Mr. Dart, for the plaintiff.

Mr. C. G. Smith, for the defendant.

Vice-Chancellor. (Sir W. Page Wood.) The question in this special case is, as to the validity of a power of sale created by a marriage settlement, the nature of which may be stated, in the events that have happened, to be this — real estate is limited upon trust for the wife for life, (I now put out of consideration the husband's interest, which was determined by his death in her lifetime), with remainder to her children, either by her then intended or any future husband, as tenants in common in tail, and then the reversion is limited back to the settlor, the father of the lady, in fee. There are also trusts declared with reference to personal estate, (which was also settled by the father), and with reference to the moneys to arise from a sale under the power in question, for the benefit of the wife for life, with remainder, in the events which have happened, at the absolute disposal of the wife, by will.

Such being the nature of the settlement, there is contained in it this power. [His Honor read the power of sale, and the direction for reinvestment of the purchase-money.]

The events which have happened are these: — Previously to the sale, the validity of which is now in question, the lady had had children, and one of the children had had issue, but all the issue were spent. There was no child or issue of the marriage existing at the time of the sale. The lady was then seventy years of age, and of course it was impossible she should have future children. In that state of circumstances the sale was made under the power, and the question I have to

consider is, whether the power was then a valid power, capable of being exercised under the circumstances I have mentioned.

There can be no doubt that the power was valid in its creation. After the cases of *Powis* v. *Capron*, Rolls, May 5th, 1830; 4 Sim. 138, *n.*; and see 1 My. & K. 252, and *Waring* v. *Coventry*, 1 My. & K. 249, before Sir John Leach, besides that of *Biddle* v. *Perkins*, 4 Sim. 135, previously decided by Sir L. Shadwell, and several other cases decided subsequently to the same effect, it is plain, whatever doubts may have been suggested by Lord Eldon's remark in *Ware* v. *Polhill*, 11 Ves. 257, that a collateral power of sale contained in a settlement by which estates tail are created, is manifestly good in its creation, inasmuch as it is in the power of any of the tenants in tail to destroy by means of a recovery the power so created. So far, therefore, as the original creation of the power is concerned, there is no doubt that it was properly, validly, and effectually created.

In the events which have happened, however, the issue has been spent, and there is a physical impossibility of the lady having future issue: and assuming that I am obliged to consider that to be the case, the limitation will, with regard to the real estate, stand thus — a limitation to the lady for life, the reversion being limited to her father in fee.

With regard to the doubt suggested by *Ware* v. *Polhill*, Lord St. Leonards has said (2 Sugd. Pow. 467–469), and it has been repeated since by other authors, that the question supposed to have been decided by Lord Eldon in that case did not, in fact, arise. It is true that Lord Eldon, in holding that the power was void, put it as a ground of his decision that the power might travel through minorities for centuries. Still, that was by no means a necessary ground for the decision. There leaseholds were settled as well as freeholds and copyholds, and the result of the events which had happened was, that the leaseholds had become absolutely vested in an infant tenant in tail; and the question was, whether, after the estate had thus become absolutely vested, the power could be exercised. I apprehend there can be no doubt whatever, and Lord St. Leonards seems to have arrived at that conclusion (2 Sugd. Pow. 468, &c.), — that, when what I may call the uses of the settlement, and the purposes of the settlement, are spent, the power is no longer capable of being exercised; and although there may be a technical difficulty with respect to the power being collateral, still the court will regard the purposes of the settlement as in fact exhausted; and the purposes of the settlement being exhausted, and the power having been created solely for the purposes of the settlement, there is an end to any exercise of the power which could operate in derogation of an absolute interest acquired by any party under the trusts of the settlement.

The observations made by Lord St. Leonards on the case of *Ware* v. *Polhill* are these. He says, "The case was at first treated as an authority that the common power of sale and exchange was void as too

remote, if it were not expressly confined to lives in being and twenty-one years afterwards. But it is clear that Lord Eldon did not mean to impeach the validity of such powers. Such a power does not, like the power in *Ware* v. *Polhill,* operate to defeat the estate of the minor tenant in tail, but *transfers* it from one property to another. He is still tenant in tail, whereas in *Ware* v. *Polhill* the effect of a sale might be to defeat altogether the estate of the representative of a person who died entitled to a vested interest in the absolute property."

The cases I have referred to before Sir John Leach, which were preceded by *Biddle* v. *Perkins*, before Vice-Chancellor Sir L. Shadwell, and have been followed by other cases, have clearly decided that where an estate tail is created the power is valid, and the doctrine is now extended a step further by the case of *Boyce* v. *Hanning*, 2 C. & J. 334. There the limitation was to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder that the wife surviving might receive a rent-charge, with remainder to the children or remoter issue of the marriage as the husband and wife or the survivor should appoint, and in default of appointment to the use of all the children, their heirs and assigns forever, in equal shares as tenants in common, with executory limitations over to others in case any child died under twenty-one without leaving issue, and if no child, or if all died under twenty-one without leaving issue, then over. It was argued that the power was bad upon the ground that it was not the common case of a limitation in tail, so that the power could be sustained as being a power which could be defeated by a recovery suffered by the tenant in tail, but it was in effect a power unlimited and incapable of being defeated, in consequence of the subsequent limitation being in fee. It being a case from this court we have only the certificate of the judges upon the question, and the certificate was as follows: — "This case has been argued before us; we have considered it, and are of opinion that under the said power of sale the plaintiffs, Henry Boyce and George Mill, with such consent of the plaintiffs as required by the said power, can sell and make a valid assurance of the said premises to the said defendant." The arguments there used in favor of the validity of the power were, first, that the power might be apportioned; — that, at all events, whatever objection there might be to it with reference to its indefinite extent, it might be upheld if exercised during the lifetime of the tenant for life; and, secondly, that if it could not be so apportioned, still, being given "to the trustees or trustee for the time being," and not to the parties *nominatim,* it existed only during the trust; and from the whole provisions of the instrument it might be gathered that the power in the trustees was intended to be confined to the life of the tenant for life and the minority of the children, so as to be within the limits of the rule in question. The latter argument seems to me to concur with the view taken by Lord St. Leonards that the court will look to the whole intent and purpose of the settlement, in order to extend the exercise of the power to the objects of the settle-

ment. Therefore, whether the remainder in fee of the estate to which the power is collateral is limited so as to depend upon estates tail (in which case the power is upheld, as in *Waring* v. *Coventry*, 1 My. & K. 249, upon the ground that it can be defeated by any tenant in tail), or whether that remainder in fee or reversion in fee is limited in some other manner, and so as not to depend by way of remainder on an estate tail (in which case whenever that estate in fee vests in possession the whole object and purpose of the settlement is at an end and the power ceases) — in either case the power, although not in terms restrained to lives in being and twenty-one years afterwards, is a valid power, and is not affected by the rule against perpetuities.

The difficulty that pressed most upon my mind was occasioned by an observation of Mr. Preston in his book on Abstracts of Title, vol. 2, p. 158. He says, "For these reasons," speaking of powers, "it seems that the common power of sale and exchange in marriage settlements and wills, though not prescribed to be exercised within a given period, is good as to the estates for life, because as to them the power falls within the limited period, and also as to estates tail, because the power may be barred by any tenant in tail, and is void as to the remainder or reversion in fee when it falls into possession, *or is discharged from the estate tail;* so that the power will fail when the particular estates, perhaps when the estates tail, shall determine." The suggestion seems to have occurred to his mind, that it might be just possible in adjusting these powers according to the exigencies of the settlement, that where estates tail, — which would have enabled any tenant in tail to defeat the power as well as he could bar any other limitation over, — have been determined, a question might arise, whether, there being nothing left but a life estate and a reversion in fee, the power could still be validly exercised. But when the case is brought to that condition, it falls within what was decided in *Boyce* v. *Hanning*, where the limitation was to a party for life, with remainder over to the children in fee: and further than that, I adopt the reasoning of Lord St. Leonards in considering this very question. He says, after quoting the passage I have read from Mr. Preston's work: "The point is not without difficulty. The power, although limited as to time, is, as we have seen, good for the lives of parties living at the date of its creation, and it may be *now* that the power might be held further to exist for twenty-one years from the death of the survivor of the lives. Where the power is to be exercised by or with the consent of a tenant for life, that is of itself a lawful limit — the very power points it out — and so far is good. If the power proceed to authorize the trustees after the death of the tenant for life and during the minority of tenants in tail to sell or exchange, that might be deemed good *pro tanto*, that is, during the twenty-one years from the death of the tenant for life. If the court should go further, the power might travel through generations. If it might be exercised legally *against* a tenant in tail, although really for his benefit, it would be on the ground that the tenant in tail might

bar the power if he pleased: and although he could not do so during his minority, when, if at all, the power would be exercised against him, yet an executory limitation or shifting use after an estate tail, is open to the same objection, for the event may happen during the minority of the tenant in tail, and before it is in his power to bar the entail, and yet long after the legal limit to such limitations, if they are not preceded by an estate tail. It would be difficult to distinguish the cases." Then he says, "If an exercise of the power after lives in being and twenty-one years were allowed on this ground, it of course could not be avoided as against the remainder or reversion in fee, when that falls into possession: for unless the power continue in force so as to carry *the fee* it cannot be exercised, and if it can, the same ground that gives it validity against the estates tail will support it against the remainder or reversion, so that an execution of the power *previously* to the remainder or reversion in fee falling into possession would be valid. But clearly, after the remainder or reversion in fee had fallen into possession, the power could not be exercised. It is not improbable that the power may be sustained throughout its whole range" (2 Sugd. Pow. 471, 472). He there seems to consider the real test to be, that the moment the court finds, as in *Ware* v. *Polhill*, the effect of the settlement spent, and the estate vested absolutely in possession in any party, it will not allow the power of sale to be exercised; but as long as the trusts of the settlement continue, the power is valid for all the purposes of the settlement. Whether the absolute interest — the fee simple of the estate — is limited as in *Waring* v. *Coventry* after estates tail, or as in *Boyce* v. *Hanning* after an estate for life, so soon as the fee vests in possession, either by the estates tail being barred or otherwise, the power is determined, and the object of the settlement at an end. Till then, the power continues valid, and may be exercised so as to carry the fee.

In this case there arises a difficulty from the apparent capriciousness of the character of the settlement. But I must take the intention of the settlor to be well expressed, that so it shall be. The caprice consists in this, that, in the events which have happened, and it being clear that there can be no further issue, the result of the exercise of the power of sale is to change the devolution of the property. By the limitations of the estate the father reserved his reversion in fee after the estate tail should be spent: whereas, in the event of a sale under the power, he directed the proceeds of the sale to be held upon trusts which carry it, in the events which happened, to his daughter absolutely. However, I must look to this, that the settlor, the father, in making provision for his daughter, limits it in this way: he gives the trustees this power. He may have thought it a beneficial power to be exercised by them, — a trust to be reposed in them to be exercised as they might think fit for her benefit, during the continuance of the trusts of the settlement. If they thought fit, his intention was that it should be in their power to transfer the property in the manner I have

described, by a sale for his daughter's purposes. It might be beneficial even for her life estate, that the power should be exercised. There is no improper motive imputed to this trustee in the exercise he has so made of this power; and it appears to me, that, the power being valid, I cannot say, on the ground of this apparent capriciousness, that it has not been properly exercised.

The result is, that the power was valid, and has been properly exercised — and I must answer both the questions in the special case in the affirmative.

Decree accordingly.[1]

IN RE POWELL'S TRUSTS.

CHANCERY. 1869.

[*Reported* 39 *L. J. Ch. N. S.* 188.]

THIS was a petition by Mrs. Littlehales, for payment out of court of certain sums of stock, subject to the trusts of the will of her grandfather, James Powell.

James Powell, by his will dated December 6th, 1830, gave all his moneys, securities for money, stocks and other funds, to trustees upon trust, after the deaths of his wife, Mary Powell, and her sister, Hannah Male, to stand possessed of a sum of £2,000 Consols, in trust, to pay the interest and dividends thereof to the testator's daughter Hannah, the wife of John Hall, for her life, and after her death "in trust to and for such person or persons as his daughter, Hannah Hall, in and by her last will and testament, should direct or appoint; and in default of such direction or limitation, in trust for all and every such child or children of his said daughter as therein mentioned, share and share alike if more than one, and if there should be only one such child, in trust for such only child; and in default of any child or children, then to her own right heirs; and as to a further sum of £3,000 stock, upon trust that the said trustees should, after the death of testator's wife, stand possessed thereof upon like trusts as the said sum of £2,000." The said testator died in February, 1831. In January, 1860, the testator's wife and her sister, both being then dead, the trustees of the testator's will paid into court, under the Trustee Relief Act, a sum of £6,950 Consols, as representing (less certain deductions) the said two sums of £2,000 and £3,000 stock bequeathed by the testator's will as aforesaid, together with a further sum of £2,000 stock bequeathed by his will to Hannah Hall for her life, with power to her to appoint the same by deed. The stock representing such last-mentioned sum had been paid out by an order of court, and there was left a sum of £4,936 13*s.* 4*d.* Consols, representing the said two bequests of £2,000 and £3,000 standing in court "*ex parte* the legacies given to Hannah Hall for life, with remainders over."

[1] See Gray Perpetuities, §§ 481–509.

Hannah Hall duly made her will, dated December 11th, 1868, whereby she appointed Edmund Stainton Day and John Frederick Hall the executors and trustees thereof, and after certain specific and pecuniary legacies, and a bequest of her furniture and other household effects to her daughter, Sarah Maria Littlehales, she proceeded as follows: "As to all the rest, residue and remainder of my estate and effects, I give, devise and bequeath the same unto my said executors, upon trust: in the first place, to convert the same, or such part thereof as they shall think fit, into money, and to invest the proceeds to arise from such sale in their joint names in government securities, and to pay the annual income thereof, and also of the rest of my estate, unto my said daughter, during her life, for her sole and separate use and independent of her present and any future husband; and from and after her decease, upon trust, to stand possessed of the same in trust for all and every the children of my said daughter, who being a son or sons, shall live to attain twenty-one, or being a daughter or daughters, shall live to attain that age, or marry under that age; and if there shall be but one who shall live to attain that age, or marry as aforesaid, then in trust for such one child absolutely." The said will also contained powers of maintenance and advancement in favor of Mrs. Littlehales' children.

The will of Hannah Hall contained no mention of or reference to the will of her grandfather, James Powell, or her power of appointment thereunder. Hannah Hall died July 15th, 1869, and her will was duly proved. She had issue one child, viz., the petitioner, Sarah Maria Littlehales, born after the death of the testator, James Powell, and now the wife of Frederick Littlehales. Mrs. Littlehales had six children, infants. There was no settlement or agreement for a settlement on her marriage affecting this fund. She now presented this petition for payment of the said sum of £4,936 13*s.* 4*d.* Consols to her husband.

Mr. Speed, for the petitioner.

Mr. Kay, for Mr. Littlehales, the petitioner's husband.

Mr. Fry, for the children.

Mr. Brooksbank appeared for the executors of Mrs. Hall.

Mr. A. G. Marten, for the trustees of James Powell's will.

James, V. C., said, he was clearly of opinion that the power of appointment given to Mrs. Hall by her father's will, fell within the 27th section of the Wills Act, so that the general bequest contained in Mrs. Hall's will operated as a valid execution of such power. But the general power vested in Mrs. Hall of appointing by her will the remainder in the fund, after the termination of her life interest, being exercisable only on her death, was not equivalent to her having the absolute ownership of the fund which was tied up for the whole of her life. The interests in the fund purported to be conferred by Mrs. Hall's will on Mrs. Littlehales and her children, must therefore be taken to be interests created by the will of James Powell. Hence the rule against perpetuities must apply to this case, and the gift to the children of

Mrs. Littlehales was void for remoteness. Mrs. Littlehales was entitled to the fund, and (subject to her assent on being examined) the order would be made for payment of it out to her husband. The costs of all parties to come out of the fund.

IN RE TEAGUE'S SETTLEMENT.

CHANCERY. 1870.

[*Reported L. R.* 10 *Eq.* 564.]

PETITION.

By a settlement made on the 22nd of July, 1831, prior to the marriage of Charles Brooks Teague and Elizabeth Christiana Boote, it was declared that the trustees should stand possessed of a sum of £3,000 upon trust to invest and pay the income, during the joint lives of husband and wife, to the wife for her separate use, and after the death of either of them to the survivor for life; and from and after the death of the survivor should stand possessed of the fund, "in trust for all and every or such one or more, exclusively of the other or others, of the children" of the marriage "at such age or respective ages, day or days, and if more than one, in such parts, shares, and proportions, and with such provisos, and subject to such conditions and substitutions in favor of one or more of the other or others of the said children" as the wife, in case she should survive the husband, should by deed or will appoint; and in default for the children of the marriage equally as tenants in common, "to be vested" in sons "when and as" they should attain twenty-one, and in daughters "when and as" they should attain twenty-one or marry.

Charles Brooks Teague died on the 7th of October, 1860. There were issue six children, of whom five were living at the date of the next stated appointment, the youngest having died in early childhood. Of these five, one, a daughter, named Fanny Maria, in December, 1860, married Middleton Ashdown, without a settlement.

On the 14th of February, 1863, Mrs. Teague, widow, by a deed-poll, in execution of the power reserved to her by the settlement, appointed that the trust funds should go, as to one undivided fifth part or share, in trust for Fanny Maria Ashdown for life, for her separate use, independently of her then or any future husband, and so that her receipt alone should be a sufficient discharge for the same, "and so that she shall not have power to deprive herself thereof by anticipation;" and after her decease, in trust "for such person or persons, for such interest or interests, and in such manner," as Fanny Maria Ashdown should by deed or will appoint; and in default of such appointment, in trust for Fanny Maria Ashdown, her executors, administrators, and assigns, absolutely. She also appointed that the trust funds should go, as to

another undivided fifth part or share, in trust for Emilie Harvey Teague (an unmarried daughter) for life, for her separate use, independently of any future husband (and so on, following the words of the former gift).

Emilie Harvey Teague afterwards, being of full age, married James Robert Jeffries, as it was stated, without any nuptial settlement or contract; but this fact was not in evidence.

Mrs. Teague died in June, 1868, whereupon the fund fell into possession, and the two-fifths appointed by the deed of February, 1863, were paid into court by the trustees of the settlement.

In their affidavit the trustees stated the above facts, and that Mr. and Mrs. Ashdown had applied to them to pay and transfer the fifth share to Mr. Ashdown, on the ground that under the appointment Mrs. Ashdown was entitled to her fifth as in default of appointment, and at other times on the ground that she had an absolute power to appoint and dispose of the same share. They, however, had been advised that they could not safely pay over the share.

By a deed dated the 11th of March, 1870, and made between Fanny Maria Ashdown of the first part, Middleton Ashdown of the second part, and George Hobbs of the third part, after reciting that Fanny Maria Ashdown was, under the trusts of the deed of appointment of February, 1863, entitled to her separate use to a life-interest in the fifth, with power to appoint the remainder, "the restraint against anticipation being by law ineffectual," and that it was considered that the power of appointment given to Fanny Maria Ashdown was exercisable by her without the concurrence of her husband, but that to avoid all doubts, and for the absolute confirmation of those presents, he had consented to join in those presents, it was witnessed that Fanny Maria Ashdown thereby assigned all her life interest, and further appointed all her reversionary interest in the same fifth share, and further, with the consent and concurrence of Middleton Ashdown, assigned, and Middleton Ashdown confirmed, all the share and interest, as well reversionary as in possession, of the said Fanny Maria Ashdown in and to the funds comprised in the settlement, either by virtue of the appointment of February, 1863, or in default of appointment, to George Hobbs, upon the trusts contained in a deed of even date therewith, which were in substance, after payment of costs, for the sole benefit of Fanny Maria Ashdown.

This petition was presented by Mrs. Ashdown and George Hobbs, alleging that she had made repeated applications to the trustees of the settlement for the payment to her of the one-fifth, but that they always denied that she, either alone or in concurrence with her husband, had an absolute power of disposal over the fifth, and insisted that the restraint upon alienation in the deed of appointment of the 14th of February, 1863, was valid and effectual.

The petitioners prayed that the sum of stock which represented Mrs. Ashdown's fifth share, and any interest to accrue due in respect thereof,

might be transferred and paid to George Hobbs; and that Mrs. Jeffries' fifth share might be carried to a separate account, to be entitled "In the Matter of the Trusts of the Settlement . . . so far as relates to the share of Emilie Harvey Jeffries."

Mr. Fry, Q. C., and *Mr. Warmington*, for the petitioners.

Mr. Amphlett, Q. C., for the respondent, Mrs. Jeffries.

Mr. Hardy, Q. C., for the trustees of the settlement.

Mr. Eddis, Q. C., for the respondents, Middleton Ashdown and James Robert Jeffries.

SIR W. M. JAMES, V. C. I think that, practically, *Fry* v. *Capper*, Kay, 163, is a decision upon this point. The Lord Chancellor there observes (Kay, 170): "Upon principle I think that Mr. Willcock has given the proper answer to the objection. In the case of an appointment under a power, the court looks to the scope and intent of the power; and in appointments by will of real estate has, by the doctrine of *cy-près*, given effect to them against the very words of the instrument, . . . and because the words of the appointment would otherwise have been wholly inoperative, the court has thus given effect to it, in the mode in which it can take effect legally. . . . According to *Bray* v. *Hammersley*, 3 Sim. 513, this is in other respects a good appointment to the children who are objects of the power; but if the restriction be not rejected, it is said that it will make the whole void. Rather than decide that, the court will reject the limitation, and thus leave the rest of the appointment valid." That is to say, the court, in that instance, adopted a ground which justifies on principle all the decisions that had been arrived at.

I consider that that was a sound principle on which to decide the case of *Fry* v. *Capper*, and I think it is impossible to hold that the rule against perpetuities can be abrogated in the way which has been suggested.

A second point arose as to Mrs. Jeffries' share.

Mr. Hardy, for the trustees.

Mr. Amphlett, for Mrs. Jeffries.

SIR W. M. JAMES, V. C., said that the circumstance did not affect the result of his decision. The fund must be carried to the separate account of the married lady; and, if necessary, an inquiry be directed whether any and what settlement, or agreement for a settlement, was made.

Mr. Hardy referred to *Tullett* v. *Armstrong*, 4 My. & Cr. 377.

The VICE-CHANCELLOR said that, in his opinion, *Tullett* v. *Armstrong* did not decide the point, as was contended. In *Tullett* v. *Armstrong*, the wife, when she became discovert, might have alienated the fund, and so have got rid of the fetter, but did not.

In this instance, as this lady and her husband might have married on the faith of some agreement, he should have to be satisfied that there was no ante-nuptial contract before he parted with the fund.

July 30. The petition was brought on again to-day before Vice-Chancellor Bacon.

Since the date of the former order, an assignment to a trustee in similar terms to those of the deed of the 11th of March, 1870, had been executed by Mr. and Mrs. Jeffries.

From an affidavit by Mr., and another by Mrs. Jeffries, it appeared that, at the time of their marriage, neither of them was aware that the fund came by way of appointment at all. They both thought it came under the original settlement, in default of appointment. So far from contracting on the faith of the restraint clause, they had never heard of it; and Mr. Jeffries said that if he had, he should have asserted his right to have it treated as inoperative.

On the other hand, affidavits were read, showing that upon Mr. Yarington, the solicitor of Mr. Jeffries' mother, writing to Mr. Spyer, the solicitor of Mrs. Jeffries' mother, on the subject, Mr. Spyer replied that the young lady was entitled, by way of appointment, to the share for her separate use, but did not mention the restraint upon anticipation. Mr. Yarington added that he acted rather as the friend of Mrs. Jeffries the elder than as her solicitor; that she was dead, and he believed she did not communicate the facts furnished by Mr. Spyer to her son.

Mr. Fry, Q. C., and *Mr. Warmington*, for the petitioners.

Mr. Hardy, Q. C., for the trustees, restated the question of law, and referred again to *Tullett* v. *Armstrong;* but

The Vice-Chancellor held that the question was not now open for discussion on this ground.

Mr. Hardy referred to the evidence.

Mr. Eddis, Q. C., for the respondent, James Robert Jeffries.

Mr. Bacon, V. C. The question which Mr. Hardy has so ably discussed is not now open for my judgment. I am not now hearing an appeal from my predecessor. The Lord Justice, when Vice-Chancellor, had present to his mind the authority of *Tullett* v. *Armstrong*, and I am bound by his decision.

All that now remains is to consider the result of the evidence; and that satisfies my mind, beyond a shadow of doubt, that these persons did not enter into the contract of marriage upon the faith of any agreement or understanding that the restraint on alienation should exist over this property, of the existence of which restraint they were at that time unaware.

The order will be that the cash be paid to Mrs. Jeffries, and the stock transferred to her trustee.

MORGAN *v.* GRONOW.

CHANCERY. 1873.

[*Reported L. R.* 16 *Eq.* 1.]

THIS was a suit to administer the trusts of a settlement dated the 27th of October, 1821, and made upon the marriage of Thomas Gronow and Mary Ann Lettsom, whereby a sum of £32,500 £3 10*s.* Bank Annuities was settled upon certain trusts for the benefit of Mr. and Mrs. Gronow during their joint lives and the life of the survivor of them, and after the death of the survivor, in trust for the child or children of the marriage or any one or more of such children, in exclusion of the others of them, as Mr. and Mrs. Gronow should jointly appoint, and in default of such appointment, as the survivor of Mr. and Mrs. Gronow should by deed or will appoint, and in default for the children of the marriage equally, the shares of sons to be vested at twenty-one, and those of daughters at that age or on marriage; and there was the usual hotchpot clause. The settlement contained a power to invest in land; and part of the Bank Annuities was sold and invested under this power in the purchase of two estates, the Lanharry estate and the Ash Hall estate; and the unsold residue of the Bank Annuities amounted to about £14,000.

The joint power of appointment was not exercised. Mrs. Gronow died in 1832, leaving her husband Thomas Gronow her surviving. There were seven children of the marriage, the eldest of whom was the defendant William Lettsom Gronow, who had become of unsound mind. Of the others, it is only necessary to name two daughters, Louisa Lettsom Gronow and Elizabeth Lettsom Gronow.

Subsequently to 1832, Thomas Gronow executed divers appointments under the power in that behalf contained in the settlement. Of these appointments, three only, made by deeds poll dated respectively the 12th of November, 1846, the 5th of December, 1860, and the 20th of March, 1867, need be mentioned for the purposes of this report.

By the deed poll of the 12th of November, 1846, Thomas Gronow appointed, first, that after his death the trustees of the settlement should, out of the stocks, funds, securities, and property which might have arisen from the sum of £32,500 Bank Annuities originally comprised in the settlement, and which might then be subject to the trusts thereof, raise such a sum as would be sufficient for the purchase of a government annuity of £300 during the joint lives of William Lettsom Gronow and Catherine Anne his wife, and the life of the survivor of them, and should apply the same for the benefit of William Lettsom Gronow in manner therein mentioned; and, secondly, that the trustees should, after his death, out of so much of the said stocks, funds, shares, and property as should remain after answering the purposes aforesaid,

raise two several sums of £7000; and should as to one of the said sums of £7000 invest the same in manner therein mentioned, and should stand possessed of the investments and the income thereof upon such trusts, to take effect only after the marriage of Louisa Lettsom Gronow, as she should, by any deed or deeds executed either before or after her marriage, appoint; and in the mean time, and until any such appointment, and so far as any such, if incomplete, should not extend, should pay the income of such investments to Louisa Lettsom Gronow during her life for her separate use without power of anticipation; and after her decease should hold the said investments and the income thereof upon such trusts as she should by will appoint; and should as to the other sum of £7000 invest the same and stand possessed thereof upon the trusts therein mentioned, being trusts for the benefit of Elizabeth Lettsom Gronow similar to those thereby declared for the benefit of Louisa Lettsom Gronow with respect to the first sum of £7000.

In 1857 Elizabeth Lettsom Gronow married Henry Charrington Fisher, and on the occasion of such marriage she executed a deed dated the 10th of August, 1857, whereby she purported, in execution of the power conferred on her by the deed poll of the 12th of November, 1846, to appoint the sum of £7000 to the trustees of her marriage settlement.

By the deed poll of the 5th of December, 1860, the settlement and divers appointments thereunder were recited; and amongst others the appointment by the deed poll of the 12th of November, 1846, of the two sums of £7000 and £7000, such sums to be for the benefit of the said Louisa Lettsom Gronow and Elizabeth Lettsom Gronow respectively as therein mentioned. It was also recited that the said Thomas Gronow was desirous of confirming in the manner thereinafter mentioned all the appointments and dispositions which, as appeared from the recitals thereinbefore contained, had been made of the said sum of £32,500 £3 10*s.* per cent. Bank Annuities originally comprised in the said settlement of the 27th day of October, 1821, or of the property which had arisen therefrom, or of any part or parts thereof respectively, and of appointing in the manner thereinafter mentioned, from and after the decease of the said Thomas Gronow, but subject to such prior appointments and dispositions as aforesaid, all the property which had arisen or which might arise from the said sum of £32,500 £3 10*s.* per cent. Bank Annuities, and which the said Thomas Gronow was, by virtue of the said settlement of the 27th day of October, 1821, or howsoever otherwise, empowered to appoint; and it was witnessed that, in furtherance of his said desire, the said Thomas Gronow, by virtue and in execution of the power or authority or powers or authorities to him for that purpose given or reserved by the thereinbefore recited settlement of the 27th day of October, 1821, and of all and every other powers or authorities or power or authority in any wise enabling him in that behalf, did thereby confirm the several appointments and dispositions which, as appeared from the recitals thereinbefore contained, had been made of

the said sum of £32,500 £3 10*s.* per cent. Bank Annuities originally comprised in the said settlement of the 27th day of October, 1821, or of the property which had arisen therefrom, or of any part or parts thereof respectively, and did direct and appoint that from and immediately after the decease of the said Thomas Gronow the trustees or trustee for the time being of the settlement of the 27th day of October, 1821, should stand possessed of all the property which had arisen or which might arise from the said sum of £32,500 £3 10*s.* per cent. Bank Annuities, subject to all such appointments and dispositions which, as appeared from the recitals thereinbefore contained, had been made of the said sum of £32,500 £3 10*s.* per cent. Bank Annuities, or of the produce thereof, or of any part or parts thereof respectively, upon trust that the said trustees or trustee should with or out of the income thereof, or by sale or other disposition from time to time of any portion or portions of the capital thereof, if necessary to make up any deficiency in the income, pay one annuity of £100 sterling to each of the three sons of Thomas Gronow therein named during his respective life or until alienation, and subject to the payment of such annuities as aforesaid, that all the said trust premises should remain and be upon trust for William Lettsom Gronow, his executors, administrators, and assigns, for his and their own absolute use and benefit: And it was thereby provided that it should be lawful for the said Thomas Gronow, at any time or times thereafter, by deed or writing executed as therein mentioned, or by his last will, to revoke, either wholly or in part, the direction and appointment thereby made; and by the same or any other deed or writing so executed as aforesaid, or by any will, to appoint the premises, the trusts of which might be so revoked as aforesaid, unto all or any one or more of the children of Thomas Gronow as he the said Thomas Gronow might think proper.

By the deed poll dated the 20th of March, 1867, after reciting the deed poll of the 5th of December, 1860, and particularly the power of revocation and new appointment therein contained, and also reciting various other deeds poll (but not that of the 12th of November, 1846), it was witnessed that Thomas Gronow, by virtue and in execution of the power reserved to him by the settlement of the 27th of October, 1821, and the deed poll of the 5th of December, 1860, and of every other power in any wise enabling him in that behalf, did thereby wholly revoke the direction and appointment made by the deed poll of the 5th of December, 1860, of the property which had arisen from the £32,500 £3 10*s.* Bank Annuities, and did thereby direct and appoint that from and after his decease the trustees of the settlement of the 27th of October, 1821, should stand possessed of the Lanharry estate upon trust, out of the annual produce, or by sale or mortgage, thereof, to raise the sum of £1000, and also two annuities of £150 for the benefit of the children of Thomas Gronow, as therein mentioned; and subject thereto in trust for William Lettsom Gronow, in fee; and he thereby further directed and appointed that from and after his decease the

Ash Hall estate should be held upon trust for William Lettsom Gronow in fee.

Louisa Lettsom Gronow died on the 23d of January, 1868, without having been married. By her will she appointed the £7000 first mentioned in the deed poll of the 12th of November, 1846, to her sister Elizabeth Lettsom Fisher for her separate use.

Thomas Gronow died on the 17th of August, 1870.

By a deed poll dated the 21st of October, 1870, Mrs. Fisher, in execution of the power reserved to her by the deed poll of the 5th of December, 1860, and in confirmation of the deed of the 10th of August, 1857, appointed the second sum of £7000, in the deed poll of the 12th of November, 1846, mentioned, to the trustees of her marriage settlement.

The cause now came on for further consideration. It appeared that a considerable portion of the trust funds was unappointed, and that such unappointed portion would be sufficient to purchase the annuity of £300 and one (but not both) of the sums of £7000 mentioned in the deed poll of the 12th of November, 1846. The questions, under these circumstances, were, 1. whether either of the sums of £7000 and £7000 was validly appointed; 2. whether the fund directed to be raised to purchase the annuity of £300, and the sums of £7000 and £7000, or either of them (if validly appointed), were to be raised exclusively out of the unappointed portion of the trust fund, or out of such portion ratably with the Lanharry and Ash Hall estates specifically appointed to William Lettsom Gronow.

Mr. Haynes (*Mr. Kenyon*, Q. C., with him), for the plaintiffs, the trustees of the settlement of 1821, stated the questions to the court.

Sir R. Baggallay, Q. C., and *Mr. C. Hall*, for William Lettsom Gronow.

Mr. Southgate, Q. C., and *Mr. Marten*, and *Mr. Fischer*, Q. C., and *Mr. Maclaren*, for other parties, whose interest it was to make the unappointed fund as large as possible.

Mr. Fry, Q. C., and *Mr. Everitt*, for Mrs. Fisher.

Mr. Roxburgh, Q. C., *Mr. W. R. Fisher*, and *Mr. Mounsey Heysham*, for other parties.

LORD SELBORNE, L. C. With regard to some of the points in this case, I do not think there is any difficulty at all. In the first place, with regard to the sum to be laid out in the purchase of a Government annuity for the lunatic, I think it is quite clear that the direction that that money shall be provided out of the funds and property which at the death of the tenant for life shall be subject to the trusts, is not to be read or understood as a direction that it should be taken out of any part of those funds and property that might have been validly appointed to other persons, in derogation of those appointments to other persons; unless, indeed, there had been a deficient fund, in which case this first appointment would have had priority. I am, therefore, of opinion that the appointment of the two estates called Lanharry and

Ash Hall, made by a later deed to the lunatic, takes effect; and that, if there are adequate funds to answer the appointment of the 12th of November, 1846, without interfering with those estates, the lunatic takes those estates entirely discharged of any claim in respect of the money necessary to buy the Government annuity, or of the two sums of £7000, or either of them. It would be different, of course, if there were a deficiency, and in that case the deficiency must be raised out of those estates.

The next question is as to the interest of Louisa, with respect to whom the matter stands simply in this way — that no interest in any part of the capital of £7000 beyond the mere life interest is given to her, except by virtue of a power to appoint the capital of that sum by will contained in the deed of the 12th of November, 1846. If she had been living at the date of the instrument creating the power, I should have thought that was within the terms of the power. She was not, however, then living; and, inasmuch as nothing could vest in her, or her representative, or in any one else, under an exercise of the power, except at a time which might be beyond the limits allowed by the rule as to perpetuities, not only *Wollaston* v. *King*, Law Rep. 8 Eq. 165, but principle, obliges me to hold, however reluctantly, that that is void. It is the same thing as if there had been a gift to her for her own benefit dependent upon a condition that could only be ascertained at the moment of her death, which would clearly be beyond the permitted limit of time. If there had been a gift in the deed to her when she attained the age of twenty-five, to vest then and not earlier, it would have been too remote; *a fortiori*, such a gift as this, depending upon the exercise of the power, must be too remote also.

With regard to the £7000 given to Elizabeth, if the matter had rested upon the original deed I should have been of the same opinion, because marriage in the case of an unmarried and unborn child is an event as uncertain with regard to the time at which it may take place, if it ever does take place, with reference to lives in being, as death is; and the case is not one in which there is any gift of the absolute interest in the capital to her independently of the exercise of the power, or of the other power to be exercised by will only. Nothing is given independently of those powers and the exercise of them except a life interest.

I cannot accede to the view that the cases, of which *White* v. *St. Barbe*, 1 V. & B. 399, and *Langston* v. *Blackmore*, Amb. 289, are examples, in the least degree touch such an instrument as this. *Langston* v. *Blackmore*, which is one of the strongest cases in its circumstances, was, after all, only an example of exactly the same principle as *White* v. *St. Barbe;* that is to say, that when there is an instrument which is made with the concurrence of the object of the power to whom the whole might be validly appointed (which was the case in *Langston* v. *Blackmore*), if the instrument goes on to settle the fund, as there, in strict settlement upon the object of the power for life, with remainder to such wife as that object of the power should marry, remainder to

the children of that object of the power, and, for want of such children, over to other persons, so as to make it a strict settlement, out and out, which would be absolutely operative, and leave nothing to be done if they were all objects of the power, it shall be held to be in substance, if the facts warrant it, the object of the power concurring, an appointment absolutely to the object of the power and a settlement by him on those particular limitations. Here there is no appointment to the object of the power of the capital at all, unless it is to be got at through the medium of these powers of appointment; nor is there any settlement, except by the same exercise of those future powers of appointment, upon any one whatever. The whole thing remains in abeyance, and can vest in nobody till those powers are exercised, the one of which is dependent, not upon the mere will of the person to whom it is given, but upon the future uncertain event of marriage, uncertain as to the fact and uncertain as to the time, and the other upon the equally uncertain event, as to time, of death.

At first my impression was that nothing was shown to have taken place afterwards which would mend the case in favor of Elizabeth; but more careful attention to the particular terms of the subsequent document has altered that impression, and I now think, although the original appointment was bad, except as to the life estate, as far as Elizabeth was concerned, that the subsequent deed of the 5th of December, 1860, followed up, I think, ten years afterwards by the deed of the 21st of October, 1870, have had the effect of validly vesting that £7000 in the trustees of that deed of the 21st of October, 1870. If the deed of 1860 had been, as was my first impression, simply a deed which expressed an intention to confirm a number of previous instruments as they stood, and only to exercise a power of appointment originally given to or then vested in Mr. Thomas Gronow, for some other purpose, then I should have felt great difficulty in holding that the confirmation was anything more than the statement of a desire and an intention not to interfere with the operation of the previous instruments as they were. I do not decide that. Probably I might have taken some time to look into any cases in which the language of confirmation *simpliciter* was used before I actually delivered a decision to that effect. That certainly was the impression on my mind during the progress of the argument, but I find that this deed goes much beyond that. It not merely expresses a desire of confirming in the manner thereinafter mentioned all the previous appointments and dispositions, but it proceeds to do that by way of appointment. [His Lordship read part of the deed.] Therefore, on the face of the deed, at least as strongly as in the case of *Carver* v. *Richards*, 1 D. F. & J. 548, an intention to do this by an execution of the power appears; and surely if there were anything in the nature of confirmation or setting up of any of those previous appointments, which needed a further execution of the power, when I find an intention to confirm, coupled with the express declaration that he does that by virtue and in execution of the power, I am

bound to give every effect to it which a new execution of the power for that purpose would give.

Then the question which arises is, if he had as on that day executed, for the first time — of course as far as phraseology is concerned one cannot conceive that that would have happened, but looking to the substance of it, it might have happened — if he had then, for the first time, made such an appointment as that contained in the deed poll of the 12th of November, 1846, so far as relates to the £7000 given in favor of Elizabeth, I apprehend it would have clearly been discharged from the vice of remoteness, because, although there is phraseology in it which has the aspect of application to a person unmarried at the time, yet in point of fact she was married at the time, and therefore there could have been no contingency or uncertainty; and the event on which the power was to arise had happened, and had happened in the lifetime of the person who was the first tenant for life under the original settlement. It appears to me, on principle as well as on the authority of *Carver* v. *Richards*, that that is, in fact, the operation of this deed of 1860. That would not, I apprehend, of itself have been enough to set up, as operative in law, the intermediate marriage settlement which had been executed upon the marriage of Elizabeth, though as between her and her husband probably there would have been an equity by which she would have been bound to execute, in favor of the persons taking under that instrument, the power so given to her, which was not a limited power, but a general one, which she might have executed in favor of herself; and, therefore, on the principle of *White* v. *St. Barbe*, she could clearly execute it in favor of other persons. That prior appointment, by itself, could not have been set up; but the deed of the 21st of October, 1870, seems to have been amply sufficient for the purpose of doing that which was, no doubt, in accordance with her moral, and probably her legal and equitable, obligations; so that, unless the exercise of the power of revocation comes in to destroy her title, I hold that, she is well entitled, and that her trustees take the £7000. I confess this seems to me to be the nicest point of the case; and although I have come to the conclusion that the power of revocation did not extend to this matter, and has not been exercised as to it, yet I do not dissemble from myself that there is some difficulty about that point. My reason for thinking that the power does not extend to it is this: — Although I hold that the words of confirmation were intended to operate, and did operate, in substance by way of reappointment, yet still, in considering the question of revocation, one must attend to the language and the phraseology of the deed. Now the deed, so far as language and phraseology are concerned, distinguishes between the two operations, the one of which is called, upon the face of it, confirmation, and the other is called direction and appointment. The words are these: — [His Lordship read them.] As a matter of construction, I think he intends, in the power of revocation, to refer to what had been done in terms, by way of direction and appointment, and not to that

which had been done in terms by way of confirmation; and, therefore, that he did not reserve a power of revocation as to that which he had confirmed; and, of course, therefore, exercising it afterwards, he only exercised it according to the reservation itself, and he does so, still using the same words as to direction and appointment.

I am fortified in that view by this consideration, though I do not say it is conclusive, that I can hardly suppose the testator to have been ignorant, when he executed this deed, that his daughter Elizabeth had married, and had for valuable consideration settled, so far as she could settle, this £7000 upon her husband and the issue of the marriage. It would have been unreasonable and contrary to all moral equity for the testator, confirming under those circumstances the power so acted on by his daughter, to have desired to reserve, or to have exercised, a subsequent power of revocation. My conclusion, therefore, is, that that gift of £7000 in favor of Elizabeth must prevail.

ROUS *v.* JACKSON.

CHANCERY DIVISION. 1885.

[*Reported* 29 *Ch. D.* 521.]

By a settlement dated the 12th of July, 1800, made on the marriage of John Abdy and Caroline Hatch, certain sums of bank stock and bank annuities were assigned to trustees upon trust to pay the income to John Abdy during the joint lives of John Abdy and Caroline Hatch, and after his decease to pay the income to Caroline Hatch, and after her decease upon trusts in favor of the children of the marriage as therein mentioned, with a proviso that if there should not be any child or children of the marriage (which event happened), then the trustees should stand possessed of the bank stock and bank annuities upon trust, if Caroline Hatch survived John Abdy, to transfer the same to her executors, administrators or assigns, but that if she should die in his lifetime (which event happened), then upon trust to transfer the same to such person or persons, upon such trusts, and for such intents and purposes, and subject to such provisos and declarations as she should by her will, notwithstanding her intended coverture, direct or appoint, and in default thereof, or in case any such direction or appointment should be made which should not be a complete and entire disposition of the whole of the bank stock and bank annuities, then upon trust that the trustees should stand possessed of the same, or so much thereof as should remain unappointed or undisposed of, in trust for John Abdy, his executors, administrators or assigns, and should transfer the same to him or them accordingly.

By her last will, dated the 7th of April, 1838, Caroline Hatch, then

Caroline Abdy, in pursuance and by virtue of the power and authority given and reserved to her in and by the above indenture of settlement, and of all other powers and authorities in her vested, or her thereto enabling, and in exercise and execution thereof, directed and appointed that the trustees of the settlement should as soon as might be after her decease transfer the funds then subject to the trusts of the settlement into the names of Thomas Mills and Charles Druce, to whom the testatrix also appointed and gave all the moneys, stocks and funds which she had power to dispose of by virtue of the settlement, upon trust to lay out and invest the same in the purchase of land to be conveyed to the use of John Abdy for life, and after his decease to, for, and upon the uses, trusts, intents and purposes, and with, under, and subject to the powers, provisos, declarations and agreements limited, expressed, declared and contained in and by an indenture of settlement bearing even date with, but executed before, the execution of that her will (of which settlement the said Thomas Mills and Charles Druce were also trustees), and the testatrix appointed the said Thomas Mills, Charles Druce, and her husband, trustees and executors of his will.

By the indenture so referred to in the will of Caroline Abdy, and dated the 7th of April, 1838, it was agreed and declared that the hereditaments and premises thereby appointed should from and after the decease and failure of issue of Caroline Abdy (but subject to the prior uses and estates therein mentioned), go, remain and be to the use of James Mills and his assigns during his life, and after his decease to the use of his issue in tail as therein mentioned, and in default of such issue to the use of Christopher John Mills for his life, and after his decease to the use of the plaintiff William John Rous for life, and after his decease to the use of his first and other sons in tail male, with divers remainders over.

Caroline Abdy died on the 4th of May, 1838, without ever having had any issue, and her will was proved by her husband and the other two executors, and the funds then subject to the trusts of the indenture of the 12th of July, 1800, were transferred into the names of the said Thomas Mills and Charles Druce.

John Abdy died on the 1st of April, 1840, having by his will given all the residue of his personal estate and effects to Thomas Abdy for his own use and benefit, who died on the 20th of July, 1877, having by his will appointed the defendants Cartmell Harrison and James Crofts Ingram executors thereof.

Christopher John Mills died on the 4th of October, 1855.

James Mills died on the 18th of December, 1883, without ever having had any issue. James Mills and the plaintiff were both born subsequently to the execution of the indenture of the 12th of July, 1800.

The trust funds appointed by the will of Caroline Abdy were never invested in the purchase of land pursuant to the direction in that behalf

in her will, and were when this action was commenced standing in the name of the trustees of her will.

The plaintiff claimed a declaration that the will of Caroline E. H. Abdy operated as a valid execution of the power of appointment reserved to her by the indenture of the 12th of July, 1880, and that the trust funds subject to the indenture of settlement were validly appointed, and that the plaintiff was entitled to the income thereof.

Rigby, Q. C., and *Stirling*, for the plaintiff.

Macnaghten, Q. C., and *Whately*, for Messrs. Harrison and Ingram, the executors of Thomas Abdy.

Ince, Q. C., and *W. Druce*, for the trustees of Mrs. Abdy's will.

CHITTY, J. (after stating the facts of the case proceeded as follows): Mrs. Abdy by her will expressly exercised the power of appointment given her by the settlement, directing the trustees of that settlement to transfer the funds comprised in the power to two trustees named by her, to whom she also appointed and gave "all other moneys, stocks, and funds of which she had power to dispose by virtue of the said indenture of settlement or otherwise howsoever" upon the trusts and to and for the intents and purposes therein mentioned.

The principle laid down by *Wilkinson* v. *Schneider*, Law Rep. 9 Eq. 423, is firmly established, that under a general testamentary power of appointment such as this the trustees of the settlement creating the power are bound to hand over the trust funds in their hands to the persons named by the donee of the power, and therefore the trusts in default of appointment cannot arise.

In the case of the exercise of such a power by a man the rule is clear. In the case of a married woman, which is the case before me, the late Master of the Rolls has decided in the case of *In re Pinède's Settlement*, 12 Ch. D. 667, that the married woman can make the fund her own by exercising the power, and in this case if all the trusts limited by Mrs. Abdy had failed, I have no doubt that her husband would be entitled to take the property by virtue of his marital right.

On the part of the representatives of the husband it is argued that the trusts of the will and settlement of even date are to be incorporated with and read as part of the settlement of 1800, and that then, according to the decision of James, V. C., in *In re Powell's Trusts*, 39 L. J. (Ch.) 188, they are invalid as contravening the rule against perpetuities: that is so, and the question therefore arises whether the decision in *In re Powell's Trusts* is consistent with the course of authorities. James, V. C., in that case decided that such a general testamentary power of appointment given to a married woman is not equivalent to ownership, so that as regards the rule against perpetuities the interest arising under the execution of the power by her will must be considered as created under the deed or will conferring the power.

This decision is reported in the Law Journal reports, and also in the Weekly Reporter, but it is not reported in the Law Reports, but I am not entitled to say on that account that it is not properly reported,

or an authority to which I need pay no attention. The case is reported, and I must attend to it and deal with it as best I can. I think the Vice-Chancellor in that case fell into an error. I can find no distinction between the case of capacity to alienate existing by reason of a general power and general capacity to alienate property. For the purposes of the power, the person exercising it, whether a man or a married woman, stands in exactly the same position with reference to the disposition purported to be made under the power.

Mr. Butler and Lord St. Leonards both treat a general power of appointment as outside the rule against perpetuities. Lord St. Leonards in his work on Powers says (8th ed., p. 394): "A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases." He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable. Lord St. Leonards also says, *Ibid.*, p. 395: "Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power, and not of the creation of it." He goes on to quote Mr. Powell's note to Fearne's Executory Devises (page 5), in favor of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. Powell can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee.

There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. Butler, who says that this proposition is established "after a series of cases:" Butler's Coke upon Littleton, 272 *a*.

I think, therefore, there must be some error, some slip in the decision of James, V. C., in *In re Powell's Trusts*, and that the case was wrongly decided, and consequently that I must treat a *feme covert* as capable of creating the same limitations under a general power of appointment as she could under a will of her separate estate. The result, therefore, is, that I hold the appointment by Mrs. Abdy valid, and I give judgment for the plaintiff in the terms asked for by the statement of claim.[1]

[1] See *In re Flower, Edmonds* v. *Edmonds*, 55 L. J. Ch. N. S. 200 (1885), *accord*.

SMITH'S APPEAL.

SUPREME COURT OF PENNSYLVANIA. 1879.

[*Reported* 88 *Pa.* 492.]

Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKEY, and STERRETT, JJ.

Appeal from the Orphans' Court of Philadelphia County: Of January Term, 1878, No. 253.

This was the appeal of Philip L. Edwin and James M. Smith, from the decree of the court, dismissing the exceptions of the appellants and confirming the report of the auditor appointed to make distribution in the matter of the account of Robert L. Reilly, substituted trustee under the will of Lewis Ryan, deceased.

The facts and proceedings in the court below will be found in the report of the preceding case of *Castner's Appeal*, 88 Pa. 478.

Various questions as to the mode of distribution were raised before the auditor, with which these appellants have no interest, and the auditor filed his report awarding, *inter alia*, to the trustees under the will of Mrs. Mary V. J. Smith, the balance of income and principal due Mrs. Smith under the will of her father; also, one-quarter of her sister Martha's share; and, also, three-eighths of the proceeds from the sale of the house and furniture of Lewis Ryan.

The principles as to the division and the amounts thus awarded were not disputed by these appellants, but it was contended by them that the will of Mrs. Smith was inoperative and void, as an execution of the power given in the will of her father, and that the sums awarded to the trustees under her will should have been awarded to her children directly and absolutely. Accordingly exceptions were filed to the report of the auditor, which were dismissed by the Orphans' Court, and the report confirmed absolutely.

From this decree this appeal was taken.

Edward D. McLoughlin and *Edward H. Weil*, for appellants.

E. Spencer Miller, for appellees.

MR. JUSTICE PAXSON delivered the opinion of the court, March 3d, 1879.

The important question to be decided upon this appeal is, whether the execution by Mrs. Mary V. J. Smith of the power of appointment given to her by the will of her father, Lewis Ryan, is transgressive of the rule against perpetuities, and therefore void.

Lewis Ryan died on the 23d of June, 1850. By his will, executed on the 2d day of February, 1848, he devised the residue of his estate to trustees, who were directed to divide and pay one-fourth of the income for life to each of his three living daughters, for their sole and separate use, "and from and immediately after the death of either of my said daugh-

ters, in trust, to pay, assign and set over, the principal sum on which such daughter so dying, was entitled to receive the income or interest, to such person or persons and for such uses, interests and purposes, as such daughter by any last will and testament or instrument of writing, in the nature of a last will and testament, notwithstanding her coverture, may direct, limit and appoint to receive the same; and for want of any such last will and testament, then to pay the said principal sum to the child or children of such daughter in equal shares or proportions; but if either of my said daughters shall die without leaving issue, and without any last will or testament, then it is my will and desire, that the share or portion of such daughter shall be continued under the same trusts as are hereinbefore provided for the use and benefit of my surviving children, in equal proportions, in the same manner as is hereinbefore directed as to the residue of my estate."

Mary V. J. Smith, one of the daughters of Mr. Ryan, died on the 2d day of April, 1876. By her will, dated the 29th of March, 1876, she gave all the residue of her estate, which she had derived from her husband, as well as the estate as to which she had a power of appointment under her father's will, to trustees to pay and divide the income among her sons and daughters then living for life, without liability for their debts, "and upon and after their several and respective deaths, to convey, assign and transfer the share of the principal of my residuary estate, producing the income of the one dying, to such person or persons and for such estates as he or she may, by will, have appointed, and in default of such appointment, to the person or persons that would take under him or her, if he or she had died intestate owning the same."

It was a fact conceded in the cause, that Mrs. Smith's donees were all living at the time of Mr. Ryan's death.

It was argued for the appellants, that if Mrs. Smith's children should execute the power of appointment given them under her will and should create a similar trust, the result would probably be to tie up the estate of Mr. Ryan and prevent its distribution for a period of one hundred and fifty years. We have nothing to do at present with what Mrs. Smith's donees may possibly do hereafter. If they should make a bad appointment the law will strike it down. Our concern is only with the execution by Mrs. Smith of the power under the will of her father.

"A perfect definition of a perpetuity," says Chief Justice Gibson, in *Hilliard* v. *Miller*, 10 Barr, 334, "has not been given, and the nearest approach to it is found in Lewis on Perpetuities, ch. 12, where it is said to be a future limitation, whether executory or by way of remainder and of real or personal property, which is not to vest till after the expiration of, or which will not necessarily vest within the period prescribed by law for the creation of future estates, and which is not destructible by the person, for the time being entitled to the property subject to the future limitation, except with the concurrence of the person interested in the contingent event." In analogy to the restriction imposed on the creation of contingent remainders, the law has fixed the

limit to the creation of executory interests to commence within the period of a life or lives in being, and twenty-one years, allowing for the period of gestation. It matters not how many lives there may be so that the candles are all burning at the same time, for the life of the longest liver is but a single life. "But every executory estate which might, in any event, transgress this limit, will from its commencement be absolutely void:" Williams on Real Property, 262. When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity: Id. 263. Future estates limited upon a life-estate which are not sure to take effect within twenty-one years and the usual fraction, after the determination of the life estate, are void in their creation: *Davenport* v. *Harris*, 3 Grant, 164. The validity of a devise is to be tested by possible and not by actual events: Jarman on Wills, 233.

It remains to apply these well-settled rules to the facts of this case. For this purpose the will of Mr. Ryan and the appointment of Mrs. Smith under it must be regarded as one instrument. The appointment cannot carry the estate beyond the period when by law the original testator could have limited it. The obvious test of the validity of the execution of the power is to write that portion of Mrs. Smith's will into the will of Lewis Ryan. We would then have a gift to Mrs. Smith for life, then to her sons and daughters for life, remainder to their appointees. Under the authorities this would clearly be a bad gift, for the reason that it includes children born after the death of Mr. Ryan. It is not a sufficient answer to this to say that in point of fact there were no such after-born children, and that all of Mrs. Smith's donees were *in esse* when Mr. Ryan died. There might have been after-born children, and because of this possibility the law strikes down the appointment as being within the rule prohibiting perpetuities. Had the gift been to her sons and daughters *co nomine*, the case might have been different: *Slack* v. *Dakyns*, Law Rep. 15 Eq. 307; *Phipson* v. *Turner*, 1 Simons, 227. This could have been done by Mr. Ryan in his will, for the parties were all living when he died.

The appointment by Mrs. Smith under the power contained in her father's will being, for the reasons stated, wholly void, it follows that her share of his estate must be distributed under that clause in his will which provides that for want of a last will and testament on the part of either of his daughters, her share of said principal sum shall be paid "to the child or children of such daughter, in equal shares or proportions."

The decree, so far as it relates to the share of Mary V. J. Smith, is reversed at the costs of the appellees, and it is ordered that the record be remitted to the Orphans' Court, with directions to make distribution in accordance with the principles indicated in this opinion.

SECTION VI.

CHARITIES.

COMMISSIONERS OF CHARITABLE DONATIONS *v.* DE CLIFFORD.

COURT OF CHANCERY IN IRELAND. 1841.

[*Reported* 1 *Dr. & W.* 245.]

THE question in this case arose upon the construction of a codicil to the will of Edward Southwell, which bore date the 28th of July, 1750. By this codicil (which was of the same date as the will, and was duly attested) the testator gave to four trustees, to Matthew Forde, Edward Matthews, Vere Essex Lonergan, and John Trotter, their heirs and assigns, forever, a certain alms-house and two school-houses, with the rights and appurtenances thereunto belonging; and also the town and lands of Listowder and Ballydian, situate in the county of Down, and at that time set at the clear yearly rent of £237 or thereabouts; to the intent, that the said alms-house should be forever thereafter kept and employed as a residence for six old men and six old women; and that the said school-houses should be forever thereafter employed, as the same had been theretofore and were then used, for the reception and education of ten poor boys and ten poor girls, and the residence of the schoolmaster and schoolmistress respectively; and as to the town and lands of Listowder and Ballydian, that the rents and profits thereof as the same were then let, should be applied in and towards the maintenance and support of the said alms-house, the salaries of the schoolmaster and mistress, and the maintenance and education of the boys and girls, the repairs of the said alms and school-houses, &c., as in the said codicil particularly mentioned. The codicil then proceeded thus: "And to the further intent and purpose, that the person, or persons, of the Southwell and Cromwell families, whether male or female branches thereof, who for the time being should be lord or lords, lady or ladies, of the manor of Downpatrick aforesaid, should from time to time have the nomination of the school-master and school-mistress, steward and apothecary, alms-people, and children of the said alms and school-house. And in case both the said families of Southwell and Cromwell shall become extinct, so that the manor of Downpatrick shall pass out of the said families, then the said trustees, and the persons who, pursuant to the directions hereinafter mentioned, shall from time to time, forever hereafter, be successively chosen and appointed as trustees in their room and stead, shall have the same power, authority, and nomination, as is hereby given to the Southwell and Cromwell families respectively."

The codicil then proceeded to give a power to appoint new trustees, with the approbation of the lord or lords, lady or ladies of the manor of Downpatrick, as long as the Southwell and Cromwell families should last; so as always that there should be the complete and full number of four trustees. Then there was contained a power to the persons, who were to have the direction and management of the provision limited for the endowment of the alms-house and school-houses, after the expiration of the present leases, to lease the said premises for thirty-one years in possession, or for one, two, or three lives, and at the best improved rent; "and that whatever surplus money shall, upon the making of such lease or leases, arise yearly out of the said lands and premises, more than what will be sufficient for the provision hereinbefore limited for the endowment of said almshouse and schools, the same shall go to the sole and only use and behoof of the person, or persons, of the Southwell and Cromwell families, whether male or female branches thereof, who for the time being shall be lord or lords, lady or ladies, of the manor of Downpatrick aforesaid, in case such person, or persons, shall protect the said alms-house and schools, and faithfully observe and execute the directions hereinbefore given to them, concerning the same; and if the said person, or persons, shall not protect the said alms-house and schools, and faithfully observe and execute the said directions concerning the same; or if the said families of Southwell and Cromwell shall both become extinct, that then, and in either of the said cases, the trustees for the time being of the provision hereby limited for the endowment of the said alms-house and schools, shall, from time to time, and at all times forever hereafter, receive and apply the said surplus rents, if any such there be, as an additional provision to the endowment hereinbefore given to the said alms-house and schools, ratably and in proportion to the amount thereof, in such manner as to the said trustees, or the majority of them, shall seem meet and expedient."

The testator departed this life on the 16th of March, 1755, without having altered or revoked the said codicil, leaving Edward Lord Clifford, his only son and heir-at-law, who died in 1777, leaving Edward Lord De Clifford, his eldest son and heir-at-law. Lord Clifford, on the death of the testator, became seised and possessed of the manor of Downpatrick, and upon his death, his heir, Lord De Clifford, in like manner, became lord of the manor, and so continued until 1832, at which period he died intestate, leaving Sophia Baroness De Clifford, Augustus Frederick Lord Viscount Bury, Mary Elizabeth Countess of Romney, and Sophia Mary Cust, his co-heirs-at-law.

In 1839, the manor of Downpatrick was sold to David Ker, Esq., of Portavoe.

The plaintiffs by their bill charged, that Mr. Ker was not one of the family of Southwell or Cromwell, or in any way connected with the said families, which are, in fact, one and the same; and that by reason of the sale to Ker, the members of said families have ceased

to become lords or ladies of the manor of Downpatrick, and had, within the meaning of said codicil, become extinct; and that, consequently, the surplus rents became and were applicable, as an additional provision, to the endowment by the said codicil given to the said alms-house and schools; but that, notwithstanding, the said coheirs still continued to receive the rents and profits of the said lands of Listowder and Ballydian.

The bill further charged, that the particular sums specified in the codicil were insufficient to keep up and maintain the charitable establishment to the extent and in the manner intended by the testator, and that the schools were in a very decayed and neglected state, by reason of want of funds and proper trustees to manage same.

The bill further stated, that the four trustees named in the codicil were long since dead, and that no trustees had ever been appointed in their place; that Matthew Forde was the survivor, and that the legal estate in the said lands and premises was accordingly vested in his heir-at-law, the Rev. William Brownlow Forde.

The bill prayed an account of the rents and profits of the said demised lands and premises, which had come to the possession of the defendants, or any of them, since the sale of the manor of Downpatrick, and for a reference to the master, to settle a scheme for the application of the increased endowments to arise from such surplus rents and profits; and to appoint new trustees, so as to complete the number specified in the codicil.

The defendants, who were the heirs at law of the testator, and the several trustees of their respective marriage settlements, answered jointly, and by their answer, admitted the sale of the manor of Downpatrick, and of the entire of the estate of Down, except the lands of Listowder and Ballydian, to Mr. Ker, and that Mr. Ker was not one of the family of Southwell or Cromwell, or in any way related thereto; but denied that the said families were one and the same, or that either branch of the family had become extinct. They admitted, that all the members of the families of Southwell and Cromwell had ceased to be lords or ladies of the manor of Downpatrick, or to have any estate or interest therein; but denied that the families had, within the meaning of the codicil, become extinct, or that under the provisions of the codicil, the surplus rents became applicable as an additional provision to the endowment given to the said alms-house and schools, and submitted, that according to the only construction that could support the plaintiff's claims, the gift over of the surplus rents would be void in law.

The Solicitor-General, *Mr. Serjt. Green*, and *Mr. Radcliff*, for the plaintiffs.

The Attorney-General, *Mr. Serjt. Warren*, *Mr. T. B. C. Smith*, and *Mr Tomb*, for the defendants.

Mr. Crozier, for the Rev. William Brownlow Forde.

The Lord Chancellor. [Sir E. B. Sugden.] [His Lordship, after reading the codicil, proceeded to say:] The question raised in

this case is, as to the disposition of the surplus rents of the lands of Listowder and Ballydian, after the payment of the several sums given by the codicil, for the maintenance and support of the charitable institutions established by the testator.

It was but faintly urged, that the testator had by his language so dedicated the estates to charitable purposes, that the court would declare the families of Southwell and Cromwell, as well as those persons, who should be appointed trustees under the proviso for that purpose, to be not merely trustees to effectuate the charities specified in the codicil, to the extent of the actual gifts, but also, in the event of a surplus, trustees of that surplus for the same or similar objects. Upon this point, however, I am clearly of opinion it is impossible to raise any arguable question. The testator himself has precluded it, by distinctly and in terms providing, that when by a new letting the rents should be increased, the surplus over and above the sums to be disbursed for the specific charities "should go to the sole and only use of the person or persons of the Southwell and Cromwell families, whether male or female branch thereof, who for the time being should be lord or lords, lady or ladies of the manor of Downpatrick." Then again, it was contended, and the argument struck me as a very singular one, that this being a gift to the members of these families to regulate the charities, this court had a jurisdiction to shift that management over, and, therefore, the members of these families could be looked upon only as officers of the charity, part of the machinery, as it were, to carry out the charitable intentions of the testator, and only as such entitled to the surplus rents. If any doubt existed on the expressions used in the codicil, I think I ought to look upon these parties as placed by the testator in the very position, which he himself occupied during his lifetime in regard to these charities, and to treat the directions, which he has given, rather as powers to these families, than anything else; powers, which entitled them to nominate the various officers connected with the institutions, to pay their salaries, and in the event of a surplus, to dispose of that surplus for their own use. But even in the view taken in the argument, and supposing the gift over good, there is no foundation for the claim of the plaintiffs, unless the gift over has taken effect by the happening of the specified events.

Two other questions were argued: first, whether the gift over is not on an event too remote, according to the now well established principles of law as to executory devises? and secondly, if not too remote, whether the event upon which the gift is to arise, has or not happened?

The first of these questions depends upon the nature of the estate given to the members of these families. Now, I apprehend, that the words of that gift must be considered to pass the surplus rents in fee simple; for not only is the gift for a period which might last forever, but the gift over, which in the given event is substituted for it, is stated in terms to be forever, from which it may fairly be inferred, that that, for which it was substituted, was intended to

have a similar duration, unless curtailed by the gift over. I think, therefore, that this is a clear equitable devise of a fee qualified or limited; a fee in the surplus rents for this family, so long as they shall be lords and ladies of the manor of Downpatrick, "in case" (and I must here read the words "in case" as if they were "whilst" or "so long as") certain persons protect the alms-house, &c., and thus the limitation would assume the same character, as that which is so familiar to us all, viz., while such a tree shall stand, or the happening of any other indifferent event. Such being my opinion with respect to the estate devised to these families, I must hold the gift over void. The law admits of no gift over dependent on such an estate; a limitation after it is void and cannot be supported, otherwise it would take effect after the time allowed by law, and it has been fairly admitted, that limitations over to a charity do not differ from any other, but to be effectual, must be confined within the usual period.

This decision renders the consideration of the second question unnecessary. I am, however, clearly of opinion, that, in point of fact, neither of the events, upon which the limitation over was to arise, has happened. First, as to neglect in the faithful performance of the directions given, has this happened? Clearly not; for though the plaintiffs inserted in their bill a charge to the effect, that the defendants had neglected them, they did not produce a particle of evidence in support of that charge: the first event, therefore, never arose. The other event was, "or if the said families of Cromwell and Southwell shall both become extinct." The meaning of this is, in case there should be a failure of issue, and not, as was contended, an extinction of the families as lords and ladies of the manor of Downpatrick. In the former part of the codicil, when speaking of the management of the charity and the appointment of the officers, &c., the same expression occurs, and there is there a key to its meaning; "and in case both the said families of Southwell and Cromwell shall become extinct, so that the manor of Downpatrick shall pass out of the said families," plainly showing that by the extinction of the families, the testator meant a failure of issue. Now, this event has not arisen, for the families are still in existence; therefore, neither of the events has happened upon which this limitation over was to take effect.

In that part of the argument which relied upon the effect of an entire dedication of these estates to charitable purposes, the cases of *The Attorney-General* v. *The Cordwainers' Company*, 3 Mylne & K. 534, and *The Attorney-General* v. *The Coopers' Company*, 3 Beav. 29, were cited; but neither of those cases touch the point raised here; they bear no resemblance to it. Here, the testator, having in his mind the increase in the value of the estate by a re-letting, in express terms devises the surplus rents on the happening of such an event. The case, therefore, is altogether different. I may remark, that in neither of those cases did the judges express any opinion as to the validity of the gifts over. It is true they adverted to them; but it is plain they

did so, not with an intention of recognizing them as valid gifts, but solely in reference to the question, whether the parties took a beneficial interest in any part of the devised estates; they held, that the imposition of a penalty for the non-performance of the condition implied a benefit to the companies, but as to whether the penalties could have been enforced, there was no decision.

There is but one other point for my consideration, and that is, are those families, who, according to my opinion, are entitled to the surplus rents, bound to provide out of the surplus rents any other or larger funds than those expressly given by the testator for the effectual maintaining of the charitable institutions? They clearly are not, the intention of the testator is manifest, and by that alone I am to be guided. The case of *The Attorney-General* v. *Gascoigne*, 2 Mylne & K. 647, has been cited on this point. It appears to me there must be some omission in the report of that case; but the rule of law is there laid down correctly, although the direction seems to go beyond it. I shall follow the general rule, and not the deviation, which probably was authorized by some provision in that case.

As in this case the surplus rents are to go to the families named, it appears to me quite immaterial in what light they take them, whether as heirs-at-law or devisees; that cannot in any way affect the rights of the charities, and as their rights are the only ones at present before me, I do not feel myself called upon to pronounce any opinion on the point.

CHRIST'S HOSPITAL *v.* GRAINGER.

CHANCERY. 1849.

[*Reported* 1 *Macn. & G.* 460.]

THE material facts and circumstances of this case, which has been already reported in the court below (16 Sim. 83), and the several points raised on the hearing of the appeal, are sufficiently stated for the purpose of this report in the following judgment.

The Solicitor-General and *Mr. Blunt*, appeared for the Attorney-General, the appellant.

Mr. Stuart, *Mr. J. Parker*, and *Mr. Freeling*, for the plaintiffs, (the respondents).

Mr. Bethell, *Mr. Bacon*, and *Mr. Selwyn*, appeared for the Reading trustees, but were not heard.

THE LORD CHANCELLOR. [LORD COTTENHAM.] This is an appeal by the Attorney-General, who is a defendant in the cause, and the first question to be considered is the position which the Attorney-General has assumed by this rehearing.

The Corporation of London, as governors of Christ's Hospital, by the bill claimed certain property which had been left by the testator, John Hendricke, in 1624, to the corporation of Reading, for certain charitable purposes in that town, with a direction that if the donees should for a year neglect, omit, or fail to perform the directions of his will, such gift should be utterly void, and should forthwith be paid and transferred to the corporation of London for the benefit of Christ's Hospital. The strict execution of the directions of the will having been found inconvenient, an information was filed by the Attorney-General in the Court of Exchequer against the corporations of London and Reading, which led to a decree in 1639, varying the purposes and application of the charity, but still confined to Reading; and providing, as in the will, that if the corporation of Reading should neglect to perform the directions of the decree, or should misemploy the trust property, and such neglect and misemployment should continue for a year, the legacy should be void and of no effect as to Reading, and that the property should be forthwith paid and transferred to the corporation of London, for the benefit of Christ's Hospital.

That the directions of this decree as well as those of the will have been neglected and unperformed for the period of far more than one year, is a fact clearly established, and not in dispute on this rehearing. Upon this fact the corporation of London by their bill sought to recover the property for the benefit of Christ's Hospital, and this the decree of the Vice-Chancellor directed. The Attorney-General was properly a party to this suit, but, as it appears, took no part in the discussion. To this there could be no objection, there being before the court parties, the trustees for the town of Reading, immediately interested in resisting the claim of the plaintiffs: but that course could only be unobjectionable upon the Attorney-General's having considered that he might properly, not only leave the discussion to the other defendants, but abide by the decision upon it. I cannot approve of any party after a decree, which he did not oppose, reopening the discussion by a rehearing. As to such a party the proceeding is in effect an original hearing. What might be the result of such an attempt by an ordinary party, I need not now decide; because in cases of charities the court is less strict in enforcing its rules of proceeding, and will not upon such an objection refuse to hear such case as the Attorney-General may have to make.

This leads to the consideration of what the case is that the Attorney-General can make upon this rehearing. The only case he can make, and what he has attempted, is to show that the bill ought to have been dismissed; that so far as this cause is concerned, the court ought to have decided that, although the directions of the will and of the decree of the Exchequer have been wholly neglected, and the charity property, therefore, misapplied, the town of Reading is nevertheless to continue in the enjoyment of the property. Such in point of form must be the contention of the Attorney-General; but such is not and cannot be his real object; but he, finding that the decree shuts out the case which

he had thought it right to present to the court upon an information,[1] takes this step to remove that impediment out of his way. This again shows how unfortunate it was he did not raise the whole case in the court below, which might and ought to have been done by the cause and the information being heard together. This court is well justified in regretting, and possibly in complaining, that this was not done; but I do not think it right upon these grounds to decline giving my opinion upon the points raised now for the first time by the Attorney-General, and I proceed, therefore, to consider them, bearing in mind that this is a gift to a corporation upon certain charitable trusts, with a proviso that in a certain event such gift shall cease, and the property be transferred to another corporation for certain other charitable trusts; and that the event, upon which such cesser and transfer were directed to take place, has happened.

Brown v. *Higgs*, 8 Ves. 574, was indeed cited, as proving that the gift over could not take effect from the act of the trustees. That case not only does not support that proposition, but proceeds upon a principle inconsistent with it; for it only upon this point decided, that the object of a testator should not be disappointed by the neglect of a trustee; but in this case the testator has made the gift over to depend upon the act of the trustee; and to hold that the act of the trustee was inoperative for that purpose, would be to defeat and not to forward his object. The Attorney-General, however, further contends that this provision for cesser and transfer was void as repugnant to the original gift. This is so, if the original gift was indefeasible, but not otherwise, and that is the question; the proposition therefore is only a consequence of the point in dispute, if decided one way, and not an argument for the decision.

It was then argued that it was void, as contrary to the rules against perpetuities. These rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account.

The next argument was, that the forfeiture created by the will was destroyed by the decree, and that the forfeiture created by the decree was inoperative, being beyond the jurisdiction of the court. These arguments are not very consistent. If the court exceeded its jurisdiction in the provision for the transfer, the provisions of the will were

[1] Previously to the institution of this suit, an information had been filed by the Attorney-General on the recommendation of the charity commissioners (but to which the present plaintiffs were not made parties), praying a scheme for the future regulation of the charity, and suggesting a *cy près* application of its funds to the building and endowment of schools in the town of Reading. — Rep.

not affected by it; but in fact the decree only varied the first trusts prescribed by the will, substituting others; but preserved the forfeiture; and whether the forfeiture under the will or under the decree be the operative provision is not material, it being established that the event has happened which under either was to create the cesser and transfer. To meet this answer, it was contended, that the bill sought relief only under the provisions of the will; but that is not so, for the bill alleges that "the plaintiffs are advised that under the circumstances before stated, the limitation over in favor of the plaintiffs contained in the will has taken effect, and that the plaintiffs are now entitled under the provisions of the will and of *the decree* to have the estates and property transferred to them."

But lastly, it was contended, that the plaintiffs' claim was barred by time, more than twenty years having elapsed since the facts which are said to have created the forfeiture, and since the plaintiffs knew of these facts. Time is permitted to create a bar in order to quiet titles. Is then the Attorney-General contending that time has sanctioned the breaches of trust committed by the corporation of Reading, and that the purposes to which they applied the trust property are not to be disturbed? This cannot be, and is not the object of the Attorney-General. His object is to let in the jurisdiction of the court for the purpose of having the property applied to purposes distinct from any provisions of the will or decree. He repudiates the purposes to which the corporation of Reading were directed to apply the property, as much as he does those to which the corporation of London were directed to apply it. Is this quieting the title of the corporation, or of those who now claim in their place?[1] The question is not whether time is a bar to any claim adverse to the title of the original donee; but whether such title is to be superseded in favor of those to whom upon failure of such title the testator has given the property, or in favor of general charity unconnected with any expressed object of the testator. If, indeed, there were adverse claims between *cestui que trusts*, time might create a bar as between them, though it could not as between a *cestui que trust* and a trustee, upon the principle ultimately established in *Cholmondeley* v. *Clinton*, 2 J. & W 1; but that is not the case here: both the contending parties, the Attorney-General and the plaintiffs, under the same facts, claim the property which up to the present time has remained in the hands of the forfeiting party who no longer disputes the forfeiture. As between the Attorney-General and the plaintiffs, there has not been any adverse title or possession.

Some confusion may have arisen from the use of the word forfeiture. In one sense, the cesser of one set of trusts, and the commencement of the other may be considered as a forfeiture, but the form and substance of the provision is rather a substitution of one trust for another.

[1] *i. e.* The defendants, Grainger and others, who had been appointed by the Lord Chancellor trustees of the charity estates under the provisions of the Municipal Reform Act. — REP.

The property was vested in the corporation of Reading, but in a certain event they were to become trustees of it for Christ's Hospital. Now if the effect of these provisions was to constitute the corporation of Reading, in the event which happened, trustees for Christ's Hospital, until they transferred the property as directed, (and such it would seem was the only interest they had, and the only duty they had to perform,) there could not have arisen, as between them and the plaintiffs, any question of time or adverse possession: but that is not the question I have to consider.

It appears to me that the Attorney-General cannot maintain the points he has attempted to establish upon this rehearing, and that the decree of the *Vice-Chancellor* must be affirmed.[1]

SINNETT *v.* HERBERT.

CHANCERY. 1872.

[*Reported L. R.* 7 *Ch.* 232.]

THIS was an appeal from a decision of *Vice-Chancellor Bacon*, Law Rep. 12 Eq. 201.[2]

Mary Moine, by her will, dated the 7th of April, 1865, after giving certain annuities and disposing of her real estates, bequeathed to Frederick Rowland Roberts and John Sinnett, whom she appointed her executors, £3,000, "to be by them applied in aid of an endowment for a Welsh church now in course of erection at Aberystwith. And as for and concerning the residue of my personal estates and effects, subject to the payment of my debts, funeral and testamentary expenses, and the legacies hereinbefore by me bequeathed, I bequeath the same to the said F. R. Roberts and J. Sinnett upon trust to be by them applied in aid of erecting or of endowing an additional church at Aberystwith aforesaid."

The testatrix died on the 10th of December, 1866.

A suit having been instituted for the administration of the testatrix's estate, an inquiry was directed by the decree whether there was any church answering the description in the will of "an additional church at Aberystwith" being erected or being about to be erected at the time of the death of the testatrix.

By his certificate, the chief clerk found that there was not any church answering the description in the will of an additional church at Aberystwith being erected or being about to be erected at the time of the testatrix's death.

It appeared from the evidence of the vicar of Aberystwith, that at the date of the will there was at Aberystwith the church of St. Michael,

[1] See *Storrs Agricultural School* v. *Whitney*, 54 Conn. 342 (1887), *accord*.

[2] Part of the case is here omitted.

which was constituted by Order in Council in 1861 the district church, and that there was also a church then in course of erection as a chapel of ease to St. Michael's, and known as the "Welsh church," from its being intended to hold the services therein in Welsh. This church was opened for public worship in August, 1867. Beyond these two churches, there was no other church at Aberystwith, and there was not any church being erected or being about to be erected there, although, as the vicar stated, he had often talked with the testatrix respecting the endowment of the Welsh church, and the necessity during the summer season of additional church accommodation, either by enlarging St. Michael's, or by building an additional church, or by having an additional service for visitors at the Welsh church.

The Vice-Chancellor held that the gift of the residue was not intended to provide an endowment, except in the event of a church being erected or in course of erection at the testatrix's death, and that the gift, therefore, failed.

From this decision the Attorney-General appealed.

The Solicitor-General (*Sir G. Jessel*) (*Mr. Hemming* with him), for the Attorney-General.

Mr. Kay, Q. C. (*Mr. Speed* with him), for some of the next of kin.

Mr. Bristowe, Q. C. (*Mr. Fellows* with him), for others of the next of kin.

Lord Hatherley, L. C. I entertain no doubt as to what ought to be done in the present case. Very able arguments on both sides have been addressed to me this morning with respect to the application of the doctrine of *cy pres*, but I do not think that there is any necessity for going into that question at present. As far as I can judge from what has been stated there is a possibility of a church being built at Aberystwith, and therefore I think it is extremely probable that we may never arrive at the application of that doctrine at all.

I think it is plain in the first place that upon the true construction of the will the bequest must be taken to be a bequest for the purpose of aiding in the erection of any additional church in Aberystwith. I differ so far from the Vice-Chancellor, who thought that the testatrix intended to confine her executors to the case of an actual church erected and requiring endowment, or a church in progress of erection at the time of her death.

As to the difficulty from the possible remoteness of the time when her intention can be carried into effect, I think the case of the *Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444, is a complete answer. In that case the very point which arises here was suggested. There was a sum of £1,000 left for a good charitable purpose, namely, for the purpose of establishing a bishop in the king's dominions in America. There was no bishop in America. The sum, being only £1,000, was not very likely in itself to be sufficient to establish a bishop. Nothing could be more remote, or less likely to happen within a reasonable period, than the appropriation of that fund to that par-

ticular object. But the court did not direct any application of the fund according to the *cy pres* doctrine; it would not allow the fund to be dealt with immediately, but directed the fund to remain in hand for a time, with liberty to apply, because it was not known whether any bishop would be established. But that the court would continue to retain it forever, waiting until a bishop should be appointed, I think is a very doubtful proposition.

There have been numerous cases of gifts to charities where an inquiry has been directed, whether there is anything *in esse* to which the fund of the testator can be properly applied so as to carry out his wishes. One of the last of such cases was that cited by Mr. Bristowe, *Russell* v. *Jackson*, 10 Hare, 204, in which the testator wished a socialist school to be established. The court held the gift as to the impure personalty to be bad under the Statute of Mortmain. It then directed an inquiry what the principles of socialism were, in order to see whether they contained anything really objectionable. A similar inquiry appears to have been directed in the case of *Thompson* v. *Thompson*, 1 Coll. 395, where the testator left a fund for the appointment of a professor to teach his opinions as contained in the testator's printed books, which nobody at that time had read. It being found on inquiry that there was nothing contrary to morality or religion in the opinions contained in those books, the trust was ordered by the court to be carried out.

The course, therefore, that seems to me the correct one, upon the first part of the case, is to direct an inquiry at chambers whether or not the funds which are effectually given to the trustees for the purpose of aiding in erecting or endowing a church at Aberystwith, or any and what part thereof, can be so laid out and employed.

CHAMBERLAYNE *v.* BROCKETT.

CHANCERY. 1872.

[*Reported L. R.* 8 *Ch.* 206.]

THIS was an appeal by the Attorney-General from a decision of the *Master of the Rolls*.

Sarah Chamberlayne, by will dated the 13th of January, 1858, after giving various legacies, mostly for charitable purposes, proceeded as follows: —

"As I consider all my family the same to me, I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ I feel I am doing right in returning it in charity to God who gave it. I therefore give and bequeath all the rest, residue, and remainder of my personal estate

and effects, whatsoever and wheresoever, after payment of all my just debts, my funeral expenses, and legacies as aforesaid, unto my said brothers, William Chamberlayne, John Chamberlayne, and H. T. Chamberlayne, and to the survivors and survivor of them, and to the executors, administrators, and assigns of such survivor upon trust that they do and shall, with all convenient expedition after my death, invest the same and every part thereof in the stock called £3 per Cent. Consolidated Bank Annuities after selling such parts of the said residue as may be necessary for that purpose; and my will and desire is that the said trustees do and shall stand possessed of the said residue so invested as aforesaid upon the trusts, intents, and purposes following: (that is to say) upon trust to pay out of the annual dividends or proceeds of the said residue so invested as aforesaid the sums following, yearly and every year forever (that is to say):" — [Here followed a list of small annual payments]. "And my further will and desire is, when and so soon as land shall at any time be given for the purpose as hereinafter mentioned, that an almshouse or almshouses, consisting of ten rooms with suitable appendages for ten poor persons, should be built in the parish of Southam, in the county of Warwick; also an almshouse or almshouses, consisting of five rooms with suitable appendages for five poor persons, in the parish of Long Itchington, in the county of Warwick" [similar directions as to two other almshouses], "all to be built in a plain substantial manner, no expensive ornament whatever." [Here followed directions as to the inmates.] "And my will and desire further is, that the surplus remaining after building the almshouses aforesaid should be appropriated to making weekly allowances to the inmates of each; and my will and desire is that each room in the several almshouses aforesaid should be supplied with a suitable Bible of a large type."

The above trustees were named executors.

William and John Chamberlayne predeceased the testatrix. Henry Thomas Chamberlayne, the sole surviving executor, proved the will, and filed his bill against the other next of kin for the administration of the personal estate. The Attorney-General was served with the decree. The residuary estate, which consisted of pure personalty, was found, on taking the account, to amount to upwards of £10,000. The Master of the Rolls, on the case coming on for further consideration, held that the residue was not effectually given in charity, but was divisible among the next of kin of the testatrix.[1]

[1] Lord Romilly, M. R., after giving his reason for holding some of the legacies void, continued: —

I am of opinion that the gift of the residue is also void, not as being affected by the Mortmain Act, but as being a perpetuity. Suppose a testator gave £1,000 to be accumulated until some heir of John Jones should select a descendant of A. B. to receive it. That would be void on the ground of perpetuity, because an indefinite period might elapse before the selection was made. So here there is no gift in charity unless and until some person gives land for the purpose of the charity, which may not happen for an indefinite period. I am, therefore, of opinion that there is an intestacy as to the residue.

The Solicitor-General (*Sir G. Jessel*) and *Mr. Hemming*, in support of the appeal.

Sir R. Baggallay, Q. C., and *Mr. Speed*, for the plaintiff; and *Mr. Fry*, Q. C., and *Mr. Cadman Jones*, for the defendants.

Lord Selborne, L. C. The only question which appears to us to require decision in this case is whether, upon the true construction of the will, a trust for charitable purposes of the whole residuary personal estate was constituted immediately upon the death of the testatrix, or whether the charitable trust as to the residue not required to make the fixed payments mentioned before the directions as to the almshouses and almspeople was conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon. If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument (*Attorney-General* v. *Bishop of Chester*, 1 Bro. C. C. 444; *Henshaw* v. *Atkinson*, 3 Madd. 306; and *Sinnett* v. *Herbert*, Law Rep. 7 Ch. 232; to which may be added *Attorney-General* v. *Craven*, 21 Beav. 392) prove that such gift was valid, and that there was no resulting trust for the next of kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness. The rules against perpetuities (as was said by Lord Cottenham in *Christ's Hospital* v. *Grainger*, 1 Mac. & G. 464) "are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods." But those rules do not prevent pure personal estate from being given in perpetuity to charity; and when this has once been effectually done, it is (to use again Lord Cottenham's language) "neither more nor less alienable" because there is an indefinite suspense or abeyance of its actual application or of its capability of being applied to the particular use for which it is destined. If the fund should, either originally or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust should turn out to be impracticable, this court has power to apply the surplus, or the whole (as the case may be) to such other purposes as it may deem proper, upon what is called the *cy pres* principle.

On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift falls *ab initio*.

We agree with what was said by the Master of the Rolls in *Cherry* v. *Mott*, 1 My. & Cr. 132, that "there may no doubt be a conditional

legacy to a charity as well as for any other purpose;" and we think that the question whether this is so or not ought to be determined, like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will. We do not assent to the suggestion made by the Solicitor-General that *Cherry* v. *Mott*, and other cases of the same class which have followed it, were ill-decided. If we thought (as appears to have been the view of the Master of the Rolls) that the case now before us was really the same as if the testatrix had left her residuary personal estate to devolve on her next of kin, subject to a contingent gift to trustees "when and so soon as land shall at any time hereafter be given for the purpose," for the erection of almshouses upon the land to be so given, and the maintenance of almspeople therein, we should probably have concurred in the conclusion of his Lordship that such a contingent gift to trustees (although for a charity), having the effect of rendering the property inalienable during the whole continuance of the preceding non-charitable estates, must, in order to be valid, necessarily vest within the same limits of time as if the trustees had taken the residue (upon the same condition) for their own benefit, or for any other than charitable objects.

If, therefore, we differ (as we are compelled to do) from the decree at the Rolls, it is not on any principle of law, but upon the construction of this particular will. In this case the testatrix expressly declares her intention to "return" her whole residuary estate "in charity to God who gave it;" and she "therefore" gives and bequeaths it immediately upon her death to trustees to invest the whole in Consols, proceeding to direct various specified payments to be made out of the trust fund so created, and adding the directions on which the present question arises for the erection of almshouses and the maintenance of almspeople therein "when and so soon as land shall at any time hereafter be given for that purpose." According to *Green* v. *Ekins*, 2 Atk. 473; *Hodgson* v. *Lord Bective*, 1 H. & M. 376, 397, and other similar cases, a gift of the residue of personal estate carries with the *corpus* the whole income arising therefrom and not expressly disposed of as income, or expressly directed to be accumulated, from the day of the death of the testator. Here, therefore, nothing is undisposed of, there is no resulting trust for the next of kin. The intention in favor of charity is absolute, the gift and the constitution of the trust is immediate; the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied. Taking this view of the proper construction of the will, we hold the present case to be completely governed by *Attorney-General* v. *Bishop of Chester*, *Sinnett* v. *Herbert*, and the other authorities of that class; and we propose accordingly to vary the decree of the Master of the Rolls by a declaration that the residue of the personal estate of the testatrix (which we assume to be all pure personalty) is well given to charity,

and by directing an inquiry similar in principle to that in *Sinnett* v. *Herbert,* whether any land has been given or legally rendered available for the purposes intended by the testatrix, further consideration being reserved. The costs of all parties of the suit and of the appeal will be paid out of the residuary estate, and the deposit will be returned.

The Lords Justices concurred.[1]

SECTION VII.

CONSTRUCTION AND CY PRES.

NOTE. — See *Routledge* v. *Dorril,* p. 703, *ante.*

HUMBERSTON *v.* HUMBERSTON.

CHANCERY. 1717.

[*Reported* 1 *P. Wms.* 332.]

ONE Matthew Humberston, (reported to have been formerly a Christ-Hospital boy,) devised his estate, which was very considerable, to the Drapers Company, and their successors, in trust to convey the premises to his godson Matthew Humberston for life, and afterwards upon the death of the said Matthew, to his first son for life, and so to the first son of that first son for life, &c. and if no issue male of the first son, then to the second son of the said Matthew Humberston for life, and so to his first son, &c. and in failure of such issue of Matthew, then to another Matthew Humberston for life, and to his first son for life, &c. with remainders over to very many of the Humberstons, (I think about fifty,) for their lives successively, and their respective sons, when born, for their lives, without giving an estate in tail to any of them, or making any disposition of the fee.

On a bill brought by the first devisee against several in remainder, the trustees, and executors, and also against the Attorney-General, (no heir being to be found,) for an execution of the trusts of the will,

BY LORD CHANCELLOR [COWPER]. Though an attempt to make a perpetuity for successive lives be vain, yet so far as is consistent with the rules of law, it ought to be complied with; and therefore let all the sons of these several Humberstons, that are already born, take estates for their lives; but where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male.

2dly, Whereas it was objected, that where the limitation, for want of issue male of the first Matthew Humberston, gave a remainder over, these words, [for want of issue male of the first Matthew Humberston]

[1] See *Martin* v. *Margham,* p. 788, *post.*

did by implication create an estate-tail in the said Matthew Humberston, precedent to the next remainder; the court said, that these being words of implication only, after an express estate for life, and being in default of *such issue*, could not create an estate-tail; and the rather too, in regard this would defeat the intent of the testator, by empowering the first Matthew Humberston, by a recovery, to bar all the subsequent remainders.[1]

KEVERN *v.* WILLIAMS.

CHANCERY. 1832.

[*Reported* 5 *Sim.* 171.]

WILLIAM KEVERN, by his will, dated the 16th of January 1798, gave to Hannah Pope, his apprentice, when she arrived at the age of twenty-five years, (if she should so long live), £100, for payment whereof he bound his real and personal estate, and to each of his executors, five guineas, and then disposed of his residuary estate as follows: — "All the rest and residue of my testamentary estate, whether lands, tenements, hereditaments, moneys, goods, chattels or other effects, of what nature or kind soever, I give and devise the same unto my brother, Charles Kevern, Samuel Sims and John Blake, and I do hereby constitute and appoint the said Charles Kevern, Samuel Sims and John Blake to be joint executors of this my last will and testament, in trust, nevertheless, that the whole of my said estate shall be applied towards the support and maintenance of my wife, Susannah Kevern, during her natural life, at the discretion of my said executors; and I do hereby authorize and empower them, their executors and administrators, for that purpose, to sell, alienate and confirm, or otherwise dispose of any or all of my said real and personal estate, to the best advantage as to them may seem meet, and, after the decease of my said wife, to preserve the then remaining part of my estate, or the neat produce thereof, to and for the use and benefit of the grandchildren of my said brother Charles Kevern, to be by them and each of them received in equal proportion to the effects in hand and remaining, when they and each of them shall severally attain the age of twenty-five years, and not before; and, when the youngest thereof shall have attained the full age of twenty-five years as aforesaid, and he or she shall have received their final dividend or share of my said estate, the trust shall then cease and determine." The testator died in March 1798, and his widow Susannah Kevern died in April, in the same year.

The bill alleged that there were living, at the deaths of the testator and his widow, seven grandchildren of Charles Kevern the testator's brother; that Mary Ann Kevern, one of them, died in 1806, and that

[1] Part of the case, relating to another point, is omitted.

the plaintiff was her administrator; that several other grandchildren of the testator's brother (who were defendants to the bill), were born after the testator's decease, and some of them, after the defendant, Peter Mounier, who was the eldest grandchild, attained twenty-five; that the testator's brother died in May 1815; that such of his grandchildren as were born after the testator's death, or, at all events, after P. Mounier attained twenty-five, did not take any share or interest in the testator's personal estate; but that the plaintiff was advised that, according to the true construction of the will, the seven grandchildren of the testator's brother living at the testator's death, became severally entitled, immediately upon the death of the testator or his widow, to vested interests in one seventh part of the testator's residuary personal estate, payable on their respectively attaining the age of twenty-five years.

The bill prayed that the testator's personal estate might be applied in a due course of administration, and the clear residue thereof ascertained and divided into seven equal parts, and that one seventh part thereof might be paid to the plaintiff, as the administrator of Mary Ann Kevern.

The decree directed the master to inquire and state what grandchildren the testator's brother had, as well such as were living at the deaths of the testator and his widow, as those who had been born since the decease of the survivor of them, and when they were respectively born, and which of them were living when Peter Mounier attained his age of twenty-five years, and which of them had been born since, and whether any and which of them had attained twenty-five, and, whether any and which of them were dead, and at what times they died respectively, and whether before or after P. Mounier attained twenty five, and who were their representatives, and also when the testator's widow died, and who were the next of kin of the testator living at his decease, and whether any and which of them were since dead, and who were their representatives.

The master found that seven grandchildren of Charles Kevern, (two of whom were Peter Mounier and Mary Ann Kevern,) were living at the respective deaths of the testator and his widow; that fifteen others were born afterwards, and three more after the 19th of January 1813, on which day P. Mounier, the eldest grandchild, attained twenty-five, at which time there were seventeen grandchildren living; that P. Mounier and eleven others had attained twenty-five; that Mary Ann Kevern and four others of the grandchildren had died, and all of them before P. Mounier attained twenty-five. The master also found who were the personal representatives of the deceased grandchildren; that the testator and his widow died at the times mentioned in the bill; that Charles Kevern, who was the testator's only next of kin living at his decease, was since dead, and that the defendant William Williams was the personal representative of Charles Kevern.

Sir E. Sugden and *Mr. Daniell*, for the plaintiff.

Mr. Koe, for parties in the same interest as the plaintiff.

Mr. Knight, *Mr. Preston*, and *Mr. Garratt*, for the grandchildren born after the death of the testator's widow, but before P. Mounier attained twenty-five.

Mr. Parker, for the three grandchildren born after P. Mounier attained twenty-five.

Mr. Kindersley, for the defendant, Charles Williams.

Mr. Bethell, for the defendants, the personal representatives of the testator's widow.

THE VICE-CHANCELLOR [SIR LANCELOT SHADWELL] said that, in *Leake* v. *Robinson*, 2 Mer. 363, no distinction was made between the time of gift and the time of enjoyment: that, in this case, those only of the grandchildren were entitled to take, who were *in esse* at the death of the tenant for life.

Declare that the defendants, Peter Mounier, John Kevern, Mary Travers Kevern Mounier, Maria Jane Birdwood Parker, the wife of the defendant Joseph Parker, the defendant John Kevern, as the administrator of Maria Mounier Kevern, deceased, the plaintiff Charles Kevern, as the administrator of Mary Ann Kevern, deceased, the defendant Sally Harwood Eales, the wife of the defendant Robert Eales, and the defendant Sophia Williams, appearing by the master's report, made in this cause, to have been the only eight grandchildren of Charles Kevern, deceased, in the pleadings named, who were living at the time of the death of Susannah Kevern, the widow of William Kevern, the testator in the pleadings named, are alone entitled to the clear residue of the said testator's personal estate, in equal eighth parts or shares.

ELLIOTT *v.* ELLIOTT.

CHANCERY. 1841.

[*Reported* 12 *Sim.* 276.]

THE testator in this cause gave a legacy of £1000 to his daughter Elizabeth Elliott, and all other his personal estate and effects unto and among all and every the children, sons and daughters, of his said daughter, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years; and he directed the interest on their respective shares to be accumulated and to be paid to them as and when the principal should be payable.

Mrs. Elliott had four children living at the testator's death, and one born four years afterwards.

Mr. J. H. Palmer, for the plaintiff Mrs. Elliott, who was the testator's sole next of kin.

Mr. Knight Bruce and *Mr. Hare*, for the children of Mrs. Elliott.

Mr. W. K. Ellis, for the executor.

THE VICE-CHANCELLOR. [SIR LANCELOT SHADWELL.] I see no objection, in principle, to holding that, by the description: "all and every the children, sons and daughters of my daughter Elizabeth Elliott," the testator meant those children who were then living or might be living at his death; and then there is no objection to the gift.

When a testator speaks of the children of his daughter, the reasonable construction is that he means such children as his daughter has at his death, at which time the will speaks.

Declare that the gift in question is a gift to such of the children of the testator's daughter as were living at the testator's death.[1]

VANDERPLANK *v.* KING.

CHANCERY. 1843.

[*Reported* 3 *Hare*, 1.]

RICHARD HANWELL, by his will, dated in 1792, devised all his freehold messuages, closes, meadows, tithes, rents, hereditaments, and real estates situate in the town fields, and parishes of Long Buckley, Walford, Guilsborough, and elsewhere, in Great Britain, not thereinbefore otherwise disposed of, unto his daughter, Jane King, and to her assigns, for and during her life, without impeachment of waste; and from and after any determination of that estate in her lifetime, to the use of trustees and their heirs, to preserve the contingent uses and estates thereinafter limited; and from and immediately after her decease, to the use of all and every the child or children of the body of his said daughter Jane King, whether male or female, lawfully begotten, or to be begotten, and of his, her, and their respective assigns, for and during his, her, and their respective life and lives; and from and after any determination of that estate in the lifetime of the said child or children of his said daughter, to the use of the same trustees, to preserve, &c.; and from and after the decease of any such child or children of the body of his said daughter Jane King, and the respective deceases of all and every such child or children, and as they should severally and respectively depart this life, to the use and behoof of all and every the child or children of the body and bodies of all and every such child or children of his said daughter Jane King, whether male or female, lawfully to be begotten, and the heirs of his, her, and their respective body and bodies, such children to take in equal shares as tenants in common, and not as joint tenants. And in case of the death of any of the said children of such child or children of his said daughter Jane King, and failure of issue of his, her, or their body or bodies respectively, then the testator devised and bequeathed as well the original part or share of each of them so dying, and of whom there

[1] Followed in *Re Coppard's Estate*, 35 Ch. D. 350 (1887).

should be a failure of issue as aforesaid, as also such other part or share as should have vested in him or her or his or her issue by way of survivorship or accruer upon the death and failure of issue of any other or others of the said children, unto the survivors and survivor or others or other of them, such survivors or other children to take as tenants in common and not as joint tenants. And in case all such children of such child or children of his said daughter Jane King, but one, should die without issue, or in case there should be only one such child, then the testator devised and bequeathed the same unto such only child, and the heirs of his or her body: and for default of such issue, he devised all the said freehold messuages, closes, meadows, tithes, rents, hereditaments, and real estate unto his grandson William Hanwell Lucas and his assigns for his life, without impeachment of waste, with remainder to the use of all and every the child or children of his said grandson, whether male or female, lawfully to be begotten, and the heirs of his, her, and their respective body and bodies, in equal shares. And in case of the death of any of the said children, and failure of issue of his, her, and their body or bodies respectively, then the share or shares which should so fail to go to the survivors of such children as tenants in common, if more than one; and for default of such issue, the testator devised two third parts of the said hereditaments and real estate unto his two sisters, Sarah and Elizabeth, severally, and to their several heirs and assigns, and the remaining third part unto his nephews and nieces therein named, equally, as tenants in common.

The testator died in 1792.

At the time of the death of the testator, his daughter Jane King was living, and had three children: Elizabeth, born in 1785; John, born in 1787; and Jane, born in 1790: William Hanwell Lucas, the son of a deceased daughter of the testator, and John, the son of the daughter Jane King, were his co-heirs.

In 1793, after the death of the testator, Matilda, another child of his daughter Jane King, was born.

The testator's daughter Jane King died in February, 1831.

Of the four children of Jane King, Jane died in 1799, without having been married: Elizabeth, in 1821, married Samuel Vanderplank, and died in 1824, leaving the plaintiff Elizabeth Jane Vanderplank, born in 1822, her only daughter surviving: John married in 1813, and had three daughters, born in 1814, 1815, and 1817, respectively; and Matilda married in 1819, and had three children, born in 1822, 1823, and 1826, respectively.

William Hanwell Lucas died in 1810, having devised his real estate upon trust for his wife for life, with remainder to his children, remainder to the right heirs of his father. The widow afterwards married D. Bishopp. The heir-at-law of his father was T. F. Lucas, who became bankrupt.

After the death of Jane King, John King, her son, entered into the receipt of the rents and profits of the estate. The bill was filed in

1836 by Elizabeth Jane Vanderplank, the infant daughter of the daughter Elizabeth, against the said John King, who was the surviving co-heir of the testator, — the devisees of the deceased co-heir, William Hanwell Lucas, — the daughter Matilda, and her three children, and Samuel Vanderplank. The bill suggested that John King had brought an ejectment against Samuel Vanderplank, who was the plaintiff's natural guardian, and was in the occupation of part of the premises; that Samuel Vanderplank would have no defence to the action, inasmuch as he had for several years paid rent to John King in respect of the premises; and that as to the plaintiff's share of the estate, John King must be deemed and treated as having entered thereon in the character of guardian and trustee for the plaintiff. The bill prayed that John King might be ordered to account to the plaintiff for one third of the rents and profits of the estates received by him since the death of Jane King, his mother, including the produce of timber felled, and that one-third of the future rents and profits might be secured for the plaintiff's use; that if there was any question of the validity of the devise to the plaintiff, an issue at law might be directed; that in the mean time the title-deeds might be deposited in court, a receiver appointed, and the defendant John King restrained by injunction from proceeding in the ejectment or committing waste.

Inquiries of the state of the families were directed by the decree, and the cause came on for further directions on the report; but it appearing that the three daughters of John King were not before the court, the case stood over for the purpose of making them parties to the suit; which being accordingly done, —

Mr. Tinney and *Mr. Malins* were heard for the plaintiff.

Mr. Russell and *Mr. Stinton*, for the defendant Matilda and her children.

Mr. Tillotson, for the three daughters of John King.

Mr. Kenyon Parker, for the defendant Samuel Vanderplank.

Mr. Cooper and *Mr. Metcalfe*, for John King.

Mr. Temple and *Mr. Messiter*, for the defendant Mrs. Bishopp, one of the devisees of William Hanwell Lucas.

Mr. Smythe, for the assignee in bankruptcy of T. F. Lucas, one of the devisees of William Hanwell Lucas, the co-heir of the testator.

May 8. VICE-CHANCELLOR [WIGRAM]. The parties having desired that I should give my opinion on this case, without requiring the decision of a court of law, I shall accede to that request; although it would have been far more satisfactory to have had the judgment of a court of law.

I have considered the question during the argument, with reference to the *cy pres* doctrine, and upon that part of the case I do not think that I am at liberty to exercise any discretion. That doctrine is now sufficiently simple, and is well established, though sometimes of difficult application. If an estate is given to a person for life, or indefinitely, and after failure of issue of such person, it is given over, the court im-

plies an estate tail in the first taker, sacrificing only, in that simple case, the life estate, in order that all the issue may be embraced in the limitation. The next case which may be noticed is where a testator, after giving a particular estate to the first taker, has gone on to direct that it shall go to unborn persons in a way which would create a perpetuity, with a limitation over on failure of issue of the first taker. The court, in such a case, is embarrassed with the fact, that, besides the gift over, which, in the simple case first stated, would create an estate tail, there is a direction that the estate shall devolve in a manner not allowed by law, but which in common cases, previously to *Pitt* v. *Jackson*, 2 Bro. C. C. 51,[1] would, so far as respected the order of succession, only be consistent with and included in an intention to give an estate tail. The courts were thus placed in this position: the intention to give the estate to particular persons, in particular order of succession, was manifest; but the specified mode in which those persons were to take being excluded by the rule of law against perpetuities, the question was, whether the primary intention to benefit particular persons, in a particular order of succession, should be accomplished, and the particular mode of giving effect to it be rejected, or the whole will be inoperative. This was the difficulty with which the court had to struggle. Whether the two expressed intentions, both of which could not be effectuated, were well or ill described by the terms "general" and "particular" intention, or whether the criticism upon those expressions is just, appears to me immaterial. It is a mode of characterizing the different, and, to a certain extent, conflicting intentions of the testator, which satisfied Lord Eldon and other judges of great eminence. The meaning of the terms is now sufficiently understood. In order to preserve and effect something which the court collects from the will, to have been the paramount object of the testator, it rejects something else, which is regarded as merely a subordinate purpose, namely, the mode of carrying out that paramount intention.

In the application of this doctrine prior to the case of *Pitt* v. *Jackson*, the court so dealt with the language of testators, as to give the same corpus to the same individuals, and in the same order of succession as directed by the will. *Pitt* v. *Jackson* went much farther than that. In the first place, by giving an estate tail to the parent, the estate of the children was altogether cut out; and not only was their estate

[1] In *Pitt* v. *Jackson* (1786), by settlement on the marriage of A. it was provided that a certain sum should be laid out in the purchase of land to be settled to the use of A. for life, remainder to his intended wife for life, remainder to the use of the children of the marriage, subject to such powers, limitations and provisos as A. by deed or will should appoint, with limitation over. A. by his will declared that the investment in land had not been made, and directed that part of the trust money should be laid out in real estate to be conveyed in trust for his daughter M. during her life, remainder to trustees to support contingent remainders, remainder to all and every the child and children of M. as tenants in common in tail, and in default of all such issue, remainder over. Sir Lloyd Kenyon, M. R., *held*, that the daughter M. should take an estate tail by *cy pres*. — Ed.

rejected, but a larger corpus than the testator intended was given to the first takers. The whole estate, by the construction put upon the will, was limited so as to go to the parties in succession, instead of vesting in them contemporaneously, which was the will of the testator. Probably, a judge of less weight than Lord Kenyon would scarcely have established the application of the *cy pres* doctrine to such a case.

Taking the doctrine to be established, I confess I could never see how it was a less violent act to apply it to what is sometimes called an executory trust, than to the case of a purely legal devise. The two cases appear to me not distinguishable; and it is admitted that the decisions in equity establish that in the case of a direction to convey in a particular mode, the court will apply the doctrine of *cy pres*. But *Hopkins* v. *Hopkins*, Ca. temp. Talbot, 44; 1 Atk. 581; West. Ca. temp. Hard. 606; and *Nicholl* v. *Nicholl*, 2 W. Bl. 1159, were cases of legal devises, and there is therefore direct authority for the application of the doctrine to the case of a legal devise. The cases of powers are stronger rather than weaker examples of the same construction: there the intention is expressed to do that which the party cannot lawfully do, and the court cuts out the particular direction which is illegal, but gives the estates to the parties, so as to carry into effect the general intention. In point of fact, when the estate is once created by the power, so as to take effect under the original devise, the case is the same as if it had been a legal devise. To all these cases the doctrine of *cy pres* has been applied; and so far as this case calls for it, I am bound to apply the rule laid down in *Pitt* v. *Jackson*.

The next question is, in what way the rule is to be applied with reference to the case of Matilda. Now the devise is to a class — to the children of unborn children of Jane the daughter; and it is clear that for the purpose of determining whether the whole of that class can take, I must look at the events as they existed at the death of the testator. I cannot wait for subsequent events, so as to see whether a difficulty will be created by the birth of other children of Jane. If Jane, the first tenant for life, had died in the lifetime of the testator, there might have been no difficulty. Jane having survived her father, the difficulty has arisen; and as the estates were limited to the unborn children of Jane, and the unborn children of such unborn children, the limitations in the will could not take effect as to some of the class; and as I understand the rule laid down by Sir W. Grant in *Leake* v. *Robinson*, 2 Mer. 363, if some of the class cannot take, the others cannot, for there has been no gift to any of them apart from the gift to the others of the class. It would be impossible to say what any one separately, and not as a member of the entire class, should take; the whole class therefore must be excluded, unless the *cy pres* doctrine is to be applied; and that being so, it seems to me it must be applied to the share of Matilda.

The question then arises, whether, being obliged to alter the limitations in the case of Matilda, I am therefore bound to alter them in

the cases of the other children of Jane: upon that point I feel great difficulty. The devise is to all the children of Jane, born and to be born, equally, and to their children. To ascertain the class, it is necessary to apply the reasoning to which I have adverted. Having ascertained the class, and decided that they shall take by the *cy pres* doctrine rather than the will be inoperative, I find some of them whose estates I must break in upon, to preserve the general intention, and others with respect to whom there is no necessity for doing so. I am to apply an arbitrary doctrine, introduced merely to preserve the estates as nearly as may be, to those to whom the testator intended they should go; but I cannot see the logical necessity of going on to apply it beyond the immediate exigency of the case; of extending its application to each separate set — to limitations which do not require it — merely for the sake of adhering to one uniform rule throughout the limitations to the different branches of the family. I am bound to disregard events for the purpose of ascertaining the class; but why am I bound to disregard them, in determining what estates the parties take? Why may I not be governed, in that particular, by the exigencies of each branch of the limitation at the death of the testator? If, on the other hand, I should be of opinion that cross-remainders ought to be implied, supposing all the children of Jane to take estates tail, but that they are not to be implied if some of those children take estates for life and others take estates tail, and if the clear intention was to give cross-remainders, as between the different children of Jane, it is a strong argument for saying that the doctrine of *cy pres* requires that you should deal with every branch of the family of Jane in the same manner. If, however, it is not necessary to alter any given line of limitations in order to support it, I am not at present satisfied of the existence of any rule of law which obliges me to do so, only because another distinct line of limitations cannot be supported without the application of the *cy pres* doctrine.

May 11. In the argument of this case, it was agreed by all parties, that the devises posterior to the estate for life given to Matilda the after-born child of Jane the daughter, could not take effect as estates by purchase, and the devise being to the children of Jane as a class, it was properly admitted that the same vice which affected those estates must affect the estates posterior to the life estates of all the children.

The questions argued before me were, — first, whether the children of Jane were joint tenants or tenants in common under the will; secondly, supposing them to be tenants in common, whether I could apply to this case the *cy pres* doctrine, regard being had to the circumstances that the grandchildren of Jane were to take as tenants in common; thirdly, assuming that the *cy pres* doctrine might and ought to be applied, and admitting that it must be so applied to the share of Matilda, as to give her an estate tail, — whether estates tail must also be given to the children of Jane who were living at the death of the

testator, or whether, as to such children of Jane as were living at the death of the testator, the estates given by the will might not take effect in the way the will pointed out; and, lastly, whether cross-remainders should be implied, as to the share of Jane the granddaughter, or whether the estate went over upon her death without issue, to the ultimate devisees named in the will, or to the co-heirs at law.

Upon the first two questions, I retain the opinion expressed in the course and at the close of the argument. I think it impossible to read the will as giving estates in joint tenancy to the children of Jane the daughter of the testator, and I think the case of *Pearce* v. *Edmeades*, 3 Y. & Coll. 246, is clearly distinguishable from the present case. And for the reasons I gave at the close of the argument, I think the *cy pres* doctrine must be applied so as to sustain the will, in its application to the after-born child Matilda, and so as to sustain, as far as it can be sustained, the intention that the descendants of the after-born child Matilda should take an interest in the estate. The case of *Pitt* v. *Jackson* must be treated in this court as settled law, until it is shaken by the highest authority in the law.

With respect to the third question, — the testator has given his property to be equally divided between the members of a class in certain estates and interests; according to which equality between the different branches of the class was certainly contemplated. The court, in order to preserve the limitations in the branch of Matilda, is constrained to alter the estate given to her by giving to her an estate tail; thereby, in effect, depriving her descendants of all direct interest, and (unless the estates of the other branches are to be altered as well as that of Matilda) introducing an inequality between the interest given to the branch of Matilda, and the other branches of the family of Jane the daughter. And if in consequence of so altering the estate in the branch of Matilda, it were necessary to alter the estates in the other branches, in order to preserve any limitations in the will, I have no hesitation in saying the court might alter the estates in those other branches also: but if the inequality introduced between the branches, by the alteration of the estate given to Matilda, — not altering any other estate, — does not interfere with any of the ulterior limitations, the question is, whether the court is bound to alter more of the will upon the *cy pres* principle than the exigencies of the case call for. Now, assuming that no ulterior remainders would be affected by the inequality referred to, I think I am not bound to apply the *cy pres* doctrine to any devise in the will but those which demand its application, in order that the devise may be sustained. Then, does the necessity for applying the *cy pres* doctrine exist in any of the branches except that of Matilda? I think not. I admit that, where at the death of a testator his will may or may not create a perpetuity according to events, the court cannot await those events, but must put a construction upon the will of the testator at his death, with reference

to every event which the will may contemplate; and full effect has been given to that rule in the admission properly made in argument, that the estates by purchase given by this will to the children of the after-born children of Jane, the daughter, affect the validity of the devises by purchase to the grandchildren of Jane, the daughter, although born of parents who were living at the death of the testator. To determine the validity of a given set of limitations, the will must be applied to the facts of that particular case, as they stood at the death of the testator, and not as they stood at the date of the will. And where there are several sets of limitations, I think I am bound to take the case as it stood at the death of the testator, and to apply the *cy pres* doctrine to those cases only which at that time require that it should be applied, and so far only as each case may require its application. Suppose the testator had given different undivided portions of his estate to each of the children of Jane, the daughter, distributively, repeating the ulterior limitations in the will, in their application to each undivided share, and to the respective families, I cannot conceive that a doctrine, founded upon the principle of approximation, ought then unnecessarily to be applied to distinct shares of the estate, so as to destroy the intention in any particular case, only because with respect to another share the particular intention is necessarily sacrificed to preserve the general or paramount intention. And if that would be right in the case of a will worded as I have supposed, I think I must construe a will, expressed as this testator has expressed himself, in the same way, *i. e.* distributively, with respect to each share into which the property becomes divisible. The cases of *Humberston* v. *Humberston*, 1 P. Wms. 332, and *Bankes* v. *Le De Spencer*, 11 Sim. 508, appear to warrant this conclusion.

Then, will any ulterior consequences follow from this mode of dealing with the will, which might be avoided by applying the *cy pres* doctrine to all branches of the family alike? With respect to the implication of cross-remainders, — the reasoning which has been considered sufficient to warrant and establish the doctrine as between a class of devisees in tail has been of this nature: first, that the testator could not have intended that one of the devisees should take the whole estate, if no other were born to share it with him, — and, at the same time, have intended, that, if others were born and died immediately, such a circumstance should deprive the survivor of the shares of the deceased children in the estate. Secondly, that the testator has clearly intended, by the very expressions he has used, that the estate should go to the heir-at-law or remainderman as one entire estate, at one time, and not by fractions; and that the event upon which the estate was to go was the failure of issue of all the devisees, — an intention, which, upon the ordinary doctrine of implication, supposed an estate in the whole of the property to exist in all those devisees. Upon this reasoning, if the testator had himself given estates tail to the children of Jane, his daughter, the gift over of all and singular the premises, upon the failure

of, — "in default of such issue," (which, without relying upon the words of survivorship immediately preceding, must, I think, be construed all the issue of Jane, the daughter), would have obliged me to imply cross-remainders between the estates of the devisees. The same reasoning would, I think, have obliged me to make the same implication, if the estates for life to all the children of Jane, the daughter, could have been supported, and no cross-remainders between the grandchildren in each family had been expressly given by the will: *Roe* d. *Wren* v. *Clayton*, 6 East, 628. And if such an implication would be admissible in the two cases I have suggested, it must be admissible in this case, unless I am to exclude it upon the ground, that, where cross-remainders are expressed in one part of a line of limitations, they cannot be implied in another, or because of the difference between the limitations which I now suppose to exist between different branches of the class of devisees.

On the first of these points, that express cross-remainders exclude cross-remainders by implication, *Clache's Case*, Dyer, 330 *b.*, was referred to. On the second ground, the argument was, that there would be a want of equality or reciprocity between the children, if cross-remainders were implied where the estates were not equal. Now it seems to me that there is a substantial difference between the reasoning applicable to a devise to individuals as tenants in common, and a devise to a class as tenants in common. In the case of a devise to individuals as tenants in common, if any of them die in the lifetime of the testator, the survivors do not take the whole, but there is a lapse. This is the first ground on which cross-remainders are usually implied, and, in my judgment, it is by far the strongest and most satisfactory ground, that the testator could not have intended, that, if there was one devisee only living at his death, that one should take the whole estate, but if there were two, and one died the next moment, that then the survivor should not take the whole; and this reasoning does apply to the case of a class, but not to the case I have supposed. *Clache's Case*, if so considered, would be very much weakened as an authority to govern the case of a class. I have read attentively the cases as collected in Powell on Devises, vol. 1, p. 406 *et seq.*; see 2 Jarman on Wills, 461 *et seq.*), with Mr. Jarman's observations upon them, and the conclusion which I have formed is, that any court would, in the present day, with the disposition of construction which now prevails, carry out established principles, wherever it was certain that, by so doing, the intention of the testator was effectuated; and that any court would now hold, that an express gift of cross-remainders in one event did not preclude the court from giving cross-remainders by implication in another, either case being clearly within the scope of the reasoning upon which courts have proceeded in implying cross-remainders.

The argument of the want of reciprocity, I confess, I cannot understand: the only person damnified by the implication of cross-remain-

ders is the ultimate remainder-man, whose estate is postponed. As to the different branches, the state of circumstances which supposes a case for cross-remainders to arise supposes also that one of those branches is extinct; and the extinct branch, of course, can have no interest in the question. With regard to the other branches, the reasoning which has been considered sufficient to justify the court in giving cross-remainders by implication will apply, whether you suppose or not that one of the branches took an estate tail, and that, as to the other, the first taker took for life, and his descendants took estates in tail. The reasoning is the same in both cases. The intention was, that every one should take alike originally, as if there was no other to share with him. The intention could not have been (so the court holds) that any one branch should lose the substantial part of the estate, only because there happened to be a person to share with him for one moment. The testator intended that the property should continue in each line so long as there were descendants of that line to take; and that it should go over when, but not before, a complete failure of issue took place.

HALE *v.* PEW.

CHANCERY. 1858.

[*Reported* 25 *Beav.* 335.]

THE testator devised a messuage &c. at St. Alban's to the use of his nephew, John Hale, for life, with remainder to William Hale, (son of John Hale,) for life, and, after his decease, to the use of one or more of William Hale's children as he should by will appoint, and in default, to the use of the children, and their heirs, equally, as tenants in common. And in case of failure of issue of William Hale, then to the use of the next and every other son and sons of John Hale. And on failure of sons, or a son, to the first, second and every other daughter and daughters of the said John Hale, lawfully to be begotten, severally, successively, and in remainder, one after another, according to their priority of birth and seniority of age, the elder of such sons, and on failure of sons, the elder of such daughters, being always to be preferred to and to take a life estate in the said hereditaments and premises before the younger of such sons or daughters, as the case may be, and to have a power of appointing and devising the same unto and amongst, or to some one or more child or children of his or her body, by his or her last will and testament, or codicil, to be executed as hereinbefore mentioned. And in default of such appointment, gift or devise, the children or child of any son or daughter, as the case may be, of my said nephew, John Hale, who shall become a tenant for life of the said hereditaments and premises shall be entitled to an *absolute* estate and interest therein

in remainder expectant on the determination of such life estate, in like manner, as is hereinbefore limited, with regard to the children or child of the said William Hale, and as if the same limitations were repeated in respect of the children or child of each and every other child of my said nephew John Hale.

"*And in case of a total failure* of issue of my said nephew, John Hale, before the said hereditaments and premises shall absolutely vest in any person or persons, then I give and devise the same hereditaments unto the said Thomas Rogers and Eli Pero, their heirs and assigns, and direct that the same shall be sold, and the money arising thereby be divided amongst or be paid to such persons or person as, at the time of such failure, shall be *my next of kin*, the same being considered personal estate, and divided or paid according to the directions of the Statute for the Distribution of Intestates' Estates."

John Hale died in December, 1844. He had two children only, Elizabeth, who died in April, 1844, without having been married, and William Hale (the devisee for life), who died in January, 1855, without having had any issue.

The petitioner, who was the sole next of kin of the testator, at the time of failure of issue of John Hale, and which occurred on the death of his son William Hale, claimed to be absolutely entitled to the money to be produced by the sale of the property. She prayed a sale and payment to her of the produce.

Mr. R. Palmer and *Mr. J. H. Palmer*, in support of the petition.

Mr. Greene and *Mr. Smythe*, for the heir at law.

The Master of the Rolls. [Sir John Romilly.] I cannot arrive at the conclusion that the limitation to the trustees for sale is good.

The judges have over and over again said, that the *cy pres* doctrine ought not to be extended. The result of it is, that in order to effect the general intent at the expense of the particular intent, you defeat both, by putting the estate in the power of the first taker. The usual instance of the application of the *cy pres* doctrine is, when you give an estate to an unborn person for life, with remainder to his first and other sons in tail, which latter limitation is clearly too remote. But applying this doctrine of *cy pres*, you give to the first tenant for life an estate tail to enable all his sons to take, that is, by advancing the estate tail, which the testator desires, and in order to carry his general intention into effect, as, if the entail be not barred, each of the sons will take in succession, as the testator intended. The consequence is, that the first taker, being tenant in tail, can then defeat all the subsequent limitations. But to extend the rule to a case where the children take in fee simple, would be to extend it far beyond what has ever been done, and the effect would be, to give an estate in fee simple to the first taker, by which both the particular and the general object of the testator would be defeated.

The next question is, whether this is an estate tail? There is an estate given to William for life, with remainder to his children and their

heirs equally. It is clear that William took a life estate, and that his children took in fee. "And in case of failure of issue of William," then the estate is given to the other children of John for life, with power to appoint to their own children, and if there should be no appointment, then they are to be entitled to "an absolute estate." "And in case of a total failure of issue" of John before the hereditaments vest absolutely in any person, then on trust for sale. That is, the trust for sale arises only after the failure of such issue as is before mentioned. I entertain no doubt that this limitation for the sale of the property is too remote and void. The heir is therefore entitled.

PARFITT *v.* HEMBER.

CHANCERY. 1867.

[*Reported L. R.* 4 *Eq.* 443.]

THIS was a suit for the purpose of obtaining the opinion of the court on the construction of the will of the testator, Robert Parfitt the elder. The testator, by his will, dated the 18th of September, 1800, devised to three trustees, and their heirs, certain real estates upon trust to per-

[1] "In the first place, it is said that I am to effectuate this intention by means of the doctrine of *cy pres*. This doctrine, as I understand it, is nothing more than that which prevails in other cases of giving effect to the general intent, but with this difference, that it is not, as in them, carried into effect at the expense of the particular intent. In the common case there is a valid particular intent and there is a valid general intent, and the particular intent not in the view of the court effectuating all the intentions which they presume the testator to have had, they look to his general intent, and they effect his general intent at the expense of his particular intent. In applying, however, the doctrine of *cy pres*, nothing is sacrificed; for example, in the case of limitations under powers, where there is a good gift of a limited estate to a person an object of the power, and then a gift over to his children who are not objects of the power, effect may be given to the whole intention by giving to the parent an estate of inheritance by means of which the estate will descend to his children. In such a case, no doubt, the general intent is effectuated, but it is done at no expense of the particular intent, because there is no valid particular intent to which effect can be given. So in the case, more closely applying to that now before the court, of a limitation to an unborn son for life, with remainder to his unborn children in tail, where, as effect cannot be given to the expressed intention, because successive estates cannot be limited to an unborn person and to his issue, an estate tail is given to the party to whom the limitation was made for life: here, again, the particular intent is not sacrificed, but effect is given to it as a general intent. . . . I apprehend the rule is this, that neither by implication, nor by the doctrine of *cy pres*, can an estate be carried to a class, or a portion of a class, for whom the testator never intended to provide. For persons for whom the testator did intend to provide, a different provision may indeed be made, as was done in the case of *Pitt* v. *Jackson:* there the estate was intended to go to the children as purchasers as tenants in common, but it was not within the power of the testator to give them that estate, and the court therefore would not raise it, but it raised an estate which, although it would not go *modo et forma* as the testator had provided, would go to all the class for whom he intended to provide." — LORD ST. LEONARDS, C., in *Monypenny* v. *Dering*, 2 De G. M. & G. 145, 172–175 (1852).

mit his brother, William Parfitt the elder, to receive the rents for his life, and, after his death, he directed them to invest the rents until William Parfitt the younger, Robert Parfitt the younger, and Elizabeth Parfitt, the sons and daughter of his said brother, should respectively attain twenty-one, and divide the same as therein mentioned; and as to the disposition of the fee of the said estates after his said nephews and niece should respectively attain twenty-one, he devised the same as follows: —

"Unto my said nephews and niece, and the survivors of them, for their respective lives and the life of the longest liver of them, and to the issue and issues of them respectively for their respective lives forever, as tenants in common, and not as joint tenants, upon this trust and confidence in my said trustees to permit my said nephews and niece, and the survivors and survivor of them, to enter upon my said real estates, and receive the rents thereof in equal shares (if more than one) for their lives, and the life of the longest liver of them."

But in case any of his nephews or niece should die leaving issue, then the testator directed that the share of his nephews and niece so dying should be held for the use of such issue during minority, and when such issue should attain twenty-one, upon trust to divide the same equally amongst them; and in case all his nephews and niece should die before attaining twenty-one, and without issue, then the estates were to go to the children of William Pitt and Robert Parfeit, of Henbury, on similar trusts; and as concerning the disposition of the fee of his estate and lands, in case his nephews and niece should die without issue, or in case of the extinction and death of all their issue, the testator devised the same to the children of the said William Pitt and Robert Parfeit, of Henbury, as therein mentioned, with a gift over on the death of all of them under twenty-one, and added the following words: —

"And I direct that the before-stated entails to my nephews and niece and their respective issues as aforesaid, and in case of their death and the extinction of their issue as aforesaid to the said William Pitt and Robert Parfeit and their issue, is intended to be equally divided amongst the daughters as well as the sons of them, my nephews and niece and their issue, or, in case of their death, amongst the daughters as well as sons of the issue of William Pitt and Robert Parfeit, according to the respective share of his, her, or their parents."

The testator died in 1803. His brother, William Parfitt the elder, died in 1809, leaving the testator's two nephews and niece, William Parfitt the younger, Robert Parfitt the younger, and Elizabeth Parfitt, surviving, who all lived to attain the age of twenty-one.

Elizabeth Parfitt (afterwards the wife of R. Toleman) died in 1818, leaving one son, who died a bachelor and intestate in April, 1858, and no act was done by him or his mother to bar the estate tail.

In December, 1858, William Parfitt the younger executed a disentailing assurance of the share or shares of lands to which he was entitled under the will of the testator, or as his heir-at-law. He died in 1863,

leaving six children, who were the present plaintiffs and having by his will devised his real estates to trustees.

In June, 1863, Robert Parfitt the younger executed a disentailing assurance of the share or shares of lands to which he was entitled under the will of the testator. He died in 1865, having by his will devised his real estate to trustees.

The main question for the decision of the court was, what was the true construction of the devise in the testator's will to his two nephews and niece, and the three following constructions were contended for:

1. That the two nephews and niece of the testator took equitable estates tail in remainder expectant upon the death of William Parfitt the elder, as tenants in common, with cross-remainders between them in tail, which estates became estates in possession on the death of William Parfitt the elder.

2. That the said nephews and niece took equitable estates for life as tenants in common in remainder expectant on the death of William Parfitt the elder, with cross-remainders between them for life, and that all the limitations of the will subsequent to such life estates were void, as tending to a perpetuity.

3. That the said nephews and niece respectively took equitable estates for life in remainder expectant on the death of William Parfitt the elder, and with or without cross-remainders for life, among them, with remainder to their respective issue, either in tail or for life, and with or without cross-remainders between them in tail or for life only.

The third construction was supported by the plaintiffs; the second by the devisees in trust under the will of William Parfitt the younger; and the first by the devisees in trust under the will of Robert Parfitt the younger.

Mr. Chapman Barber, for the plaintiffs.

Mr. Bristowe, for the devisees in trust under the will of William Parfitt the younger.

Mr. Jolliffe, for the devisees in trust under the will of Robert Parfitt the younger.

Lord Romilly, M. R. I think that in this will an intention is shown to give a series of life estates in perpetuity to the issue of the nephews and niece.

If I admitted the contention that the plaintiffs, as the issue of the nephews and niece of the testator, took equitable estates for life, with cross-remainders for life between them, the result would be that, beyond the life estates taken by the issue in existence at the decease of the nephews and niece of the testator, all the subsequent limitations would be void, and the testator would have died intestate as regards them. I think this is a result which ought always, if possible, to be avoided; and I think the doctrine of *cy pres* established by *Humberston* v. *Humberston* is not a doctrine to be confined to cases where the testator has made a will of an executory character, and has imposed on the court, or on persons surviving them, the duty of carrying his general intention

into effect by framing a settlement for that purpose, but that this doctrine is a rule of construction, and that, when the court finds that the object expressed by the testator is to give to A. an estate for life, to A.'s eldest son another estate for life, and to his eldest son a third estate for life, and so on, the court will carry that intention into effect as nearly as it can, by giving to A. an estate for life, and to his eldest son, if unborn at the death of the testator, an estate in tail male, or, if he be alive at the death of the testator, an estate for life, with a remainder to his eldest son in tail male. It is obvious that if no tenant in tail executes a disentailing deed, this accurately effects the intention of the testator from generation after generation. It is true that the law, as incidental to an estate tail, allows any one of the tenants in tail in possession to defeat that intention by disentailing the estate, but this circumstance does not appear to me to affect the reasoning which entitles the court to do what, as far as can be allowed, effects the intention of the testator. In the case I have supposed, A.'s son or grandson would, if I held that he was only to take a life estate, enjoy the estate for life, and then it would go to the testator's heir-at-law; but if the construction I support applies, he still enjoys the estate for life, and if he does no act to destroy the entail, the estate goes to his son in like manner: but even if he does any act to destroy the entail, the probability is that he resettles the property in a manner more nearly resembling the wishes of the testator than any other construction would admit of.

This seems to me to be the rule of construction adopted in *Vanderplank* v. *King*, 3 Hare, 1, and also in *Monypenny* v. *Dering*, 16 M. & W. 418. Though this rule of construction may be called technical, still it is a very reasonable one, as it prevents intestacy, and executes the testator's intention as nearly as the law will allow.

I cannot in this case adopt the construction that the nephews and niece took estates tail, as it would be violating the plain words of the testator's will to give the will such a construction. I think that the intentions of the testator, as expressed by the words used by him in his will, are to be thus effected, namely, that the freehold hereditaments devised by his will are given to his two nephews and his niece for their lives and the life of the survivor, not as joint tenants, but what practically amounts to the same thing, with cross-remainders for life between them, and that, upon the death of the survivor, the children left by all three form a class who take equitable estates as tenants in common in tail general, with cross-remainders between them. As I understand that only one of these three persons left issue that survived the nephew who died last, and that the plaintiffs are these persons, I am of opinion that the plaintiffs take under this will equitable estates in tail general as tenants in common; and that as the gift over to the children of William Pitt and Robert Parfeit is only on the failure of all the issue of the first takers, my opinion is that they take with cross-remainders between them in tail.

HAMPTON *v.* HOLMAN.

CHANCERY. 1877.

[*Reported* 5 *Ch. D.* 183.]

JOHN HAMPTON, by his will, dated the 5th of November, 1862, directed his trustees that, on his daughter, Mary Ann Hampton, attaining the age of twenty-one years, she should have the full amount of the annual proceeds arising from his freehold, copyhold, leasehold, and funded property during her life for her separate use, after deducting certain annual and other payments. The testator then proceeded as follows: — "And should my said daughter, Mary Ann Hampton, live to become marriageable and die leaving a child or children behind her born in lawful wedlock, then it is my will, and I hereby direct my said trustees or their successors to apply the proceeds of my estate, after the deductions afore-named, to the support and maintenance of such child, if there is only one, or if more than one, in fair and equal proportions among such children for and during the term of their natural lives, and in like manner to their children and children's children, each family having among them the father or mother's share: or should my said daughter, Mary Ann Hampton, die previous to being married, or after marriage leaving no child or children behind her born in lawful wedlock, or, if leaving children as afore-described, upon them or their families becoming extinct," then over.

The testator died on the 14th of November, 1863. On the 12th of March, 1864, a decree was made for the administration of the testator's estate in a suit in which his daughter, Mary Ann Hampton — who was his only child — was plaintiff, and the sole acting trustee and executor of the will was defendant.

The plaintiff attained her age of twenty-one years on the 23rd of August, 1876, and now presented a petition that the defendant might be ordered to convey the testator's freehold, copyhold, and leasehold estates to her absolutely, on the ground that the limitations contained in the will subsequent to the limitation to her for life, were void for remoteness, and that consequently the estates passed to her as the testator's sole heiress-at-law and next of kin.

Cookson, Q. C., and *Tremlett*, for the petitioner.

W. Barber, for parties entitled under the ultimate gift over.

Chitty, Q. C., and *S. Cracknall*, for the defendant.

S. J. Cracknall, for other parties.

JESSEL, M. R. The questions raised on this will are by no means easily solved, and I am thankful to say I have only to solve two of them. The questions are of general interest on the law and practice of the court, and also on the general law of real property as regards the construction of devises.

The first question I have to consider is as to the general practice.

The petitioner is confessedly entitled for her life, under a will, to freeholds and copyholds which are settled upon trusts for her benefit. She claims that, according to the true construction of the will, what is expressly given to her for life is also given to her for an estate larger than an estate for life; that is to say, that she takes an estate tail in equity in the lands in question, and she asks me for a declaration accordingly, and for conveyance of the lands to her on the footing of that declaration. Of course, if that were my opinion on the construction of the will it would be my duty to comply with her prayer. That question is therefore ripe for decision.

Another question is, whether, supposing she is not entitled to an estate tail, the gifts over after her life estate are not void for remoteness, and if so, whether she is not, as the testator's sole heiress-at-law, entitled to the whole property absolutely. That is also a question which I can now decide.

The third question suggested is whether, admitting that she takes an express estate for life and that her children, if she has any, take estates for life after her death, she is not entitled to an estate tail in remainder expectant on those life estates, and to a declaration accordingly.

That, according to the practice of this court, is not a question which can be decided now.

It was always the settled law of the old Court of Chancery, and it is therefore now the settled law of the Chancery Division of the High Court of Justice, that it is not the province of the court to declare the rights of parties except in cases where immediate relief can be given. The immediate relief may be merely incident to the estate, as for instance, where a question arises as to the cutting of timber by a tenant for life or remainder-man.

So where an estate is vested in a tenant for life with remainders over, and the person to whom the life estate is given claims that under the limitations over he is really tenant in tail in possession, and asks by bill that the estate may be conveyed to him — that is allowed. But where the court is asked to do nothing more than to declare future rights, it is clear that the court will not make any declarations as to future rights, and as an authority for that proposition I will only mention the case of *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, before the Court of Appeal.

I am rather surprised, on looking at *Forsbrook* v. *Forsbrook*, Law Rep. 3 Ch. 93, to find that the Lords Justices actually decided contrary to the rule. Their decision was, in substance, this: the tenant for life under a will being alive, and the tenant in immediate remainder being also alive, they decided that there was an ultimate remainder in tail in the tenant for life. That transgressed the well-established rule of the court. The question is whether that was unintentional, or whether the Lords Justices intended deliberately to reverse the rule. I am satisfied that it was a mere slip, and the proof that it was so is

this, that when the case — it was a special case — was brought on, they noticed that in any event the plaintiffs, who were the persons in possession, must be entitled for life, and they therefore took the objection that there was no matter at present in dispute which would give the court jurisdiction to decide the questions, the rule applicable to an ordinary suit being of course equally applicable to a special case. They therefore took the very point themselves. Mr. W. Pearson, on behalf of the plaintiffs, then argued against the objection at considerable length, and concluded by submitting that the court should, if necessary, give leave to amend the special case by inserting some question which would give the court jurisdiction, as for instance a question respecting the plaintiff's right to commit waste. The Lords Justices thereupon gave permission to amend the case by inserting a question whether the plaintiffs were entitled to commit waste, and the main argument then proceeded. They therefore acknowledged the rule, and accordingly maintained the objection, and Lord Cairns, in delivering judgment, observed (Law Rep. 3 Ch. 98), "We have already said that the special case must be amended by stating that the first takers desire to know whether they have power to commit waste, and the answer to the question must be that they are not so entitled."

It is quite plain, therefore, that the Lords Justices in deciding as they did, that the existing tenants for life took an ultimate remainder in tail upon the determination of other life estates, did not really intend to alter the rule.

That being so, the question whether the petitioner in this case does or does not take an estate tail in remainder, is not ripe for decision, and consequently I ought not to express, and I do not express, any opinion upon it.

Now as to the first point raised by the petitioner, the question would not have been arguable had it not been for one authority, and I must again express an opinion similar to that I have already expressed, and say that there the judge made a slip, as all judges do at times.

The authority to which I refer is *Hayes* v. *Hayes*, 4 Russ. 311, which was a decision of Sir John Leach. It was there held that you cannot limit to an unborn child for life unless the remainder, after his death, vests in interest at the same time.

It never was law that the remainder must vest in interest at the same time. You might always give a life interest to an unborn person being a child of a person in being, and it did not matter what the gift over was after the death of such unborn child; it did not affect his interest. There must be some mistake in that decision; at all events it has never been followed. As I read the authorities, it has not only not been followed, but the contrary construction has prevailed. Indeed the contrary has been assumed, sometimes without contest, in some reported cases, and in order to show that that is so I may refer to the case of *Gooch* v. *Gooch*, 14 Beav. 565; 3 D. M. & G. 366. There a gift to children for their lives was assumed to include unborn children, and the

bill only asked that the substitutionary gift over to their children might be declared void for remoteness.

In *Williams* v. *Teale*, 6 Hare, 239, the decision was exactly the reverse of that in *Hayes* v. *Hayes*, and it is only necessary for me to read the following portion of Sir James Wigram's judgment, 6 Hare, 250: "Upon another point I have also as strong an opinion as may be consistent with the respect which is due to the decision of a very eminent judge, with which it possibly may be thought to conflict. I think that, under this will, notwithstanding the decision in *Hayes* v. *Hayes*, the limitation of the testator's property to the unborn children of the testator's children is not void for remoteness only because it is a gift to persons who might be unborn at the death of the testator."

It is plain to my mind that Sir James Wigram's decision is in direct conflict with Sir John Leach's.

The next case — which was a case before the Court of Appeal — is *Gooding* v. *Read*, 4 D. M. & G. 510. There a testator devised lands upon trust to pay the rents and profits to a tenant for life, and, after her decease, and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead. It was objected that the trusts for the children were void for remoteness, the question being whether the maintenance gift was good, that is, the gift to the children until the youngest attained twenty-five. The Master of the Rolls held it was good, and that decision was appealed from, the appellants contending that the trust for sale being void for remoteness, the trust for maintenance was inseparable from it, and therefore also void. The Lords Justices, however, dismissed the appeal with costs. *Hayes* v. *Hayes* does not appear to have been cited in that case; it is only mentioned in the reporter's note.

Now I take it that both the cases to which I have referred are not to be reconciled with *Hayes* v. *Hayes;* at all events, they differ from it so far as to leave me at liberty now to say that *Hayes* v. *Hayes* is not sound law; indeed it appears that Sir John Leach himself was dissatisfied with his decision.

That being so, it follows in this case that, whoever takes an estate tail — if any one does — at all events there is here a gift to the "child or children" of the petitioner, and that, whether the petitioner takes an estate tail, or her "child or children" take an estate tail, or no one takes an estate tail, the gift is not void for remoteness; and if *Hayes* v. *Hayes* is out of the way, the children may well take estates for life.

I am, therefore, of opinion that the gift over after the petitioner's life estate is not too remote. Then, does the petitioner take an immediate estate tail in possession? Now, there is a great deal to be gathered in favor of this view from some of the older authorities, because

they give rise to considerable difficulty as to determining what words are sufficient to create an estate tail.

First of all, there is the doctrine usually called *cy pres*. It has been said that that doctrine only applies to executory trusts; but that is not so. In the first place, the doctrine is not properly called *cy pres* at all: it is merely a rule of construction, — a rule of construction, that is, by which you sacrifice the particular intent to the general intent, or the subordinate intent to the paramount intent. When you find two intents in a will which are inconsistent with each other, and you therefore cannot carry out both, you give effect to the general or paramount intent. The rule applies just as much to direct devises as to executory trusts — where trustees are directed to convey or do some other act. That the doctrine is a rule of construction is laid down in the most express terms by Lord Romilly in *Parfitt* v. *Hember*, Law Rep. 4 Eq. 443. He says (Law Rep. 4 Eq. 446): "I think the doctrine of *cy pres* established by *Humberston* v. *Humberston*, 1 P. Wms. 332, is not a doctrine to be confined to cases where the testator has made a will of an executory character, and has imposed on the court, or on persons surviving them, the duty of carrying his general intention into effect by framing a settlement for that purpose, but that this doctrine is a rule of construction, and that, when the court finds that the object expressed by the testator is to give to A. an estate for life, to A.'s eldest son another estate for life, and to his eldest son a third estate for life, and so on, the court will carry that intention into effect as nearly as it can."

It may be said that that was only a *dictum*, not necessary for the decision of the case, but I will now refer to another case which is an actual decision on the point, namely *Monypenny* v. *Dering*, 16 M. & W. 418. That was a case which was sent to a court of law — the Court of Exchequer — and therefore the judges could only treat the case as one of express and direct legal devise. The court there discussed this doctrine which they called the doctrine of *cy pres*. [His Lordship then read part of the judgment at pages 428, 429, commencing, "The doctrine of *cy pres*, in reference to questions of perpetuity," down to the words "sacrificed to that extent his particular intention" — and continued: —]

Now in neither of these two last cases is there a trace of a restriction of the doctrine to executory trusts, and when you see it is originally a rule of construction, and the reason of the rule, there is no reason why it should be so restricted.

In *Monypenny* v. *Dering* it was said that you cannot apply the rule where the effect of so doing will be to make the estate devolve in a line of succession different from that which the testator has expressly designated. In *Jesson* v. *Wright*, 2 Bli. 1, the question was whether certain words — "heirs of the body" — could be controlled by the context, and it was held that technical words must have their legal effect, unless from other inconsistent words it is clear that the testator meant

otherwise. In that case the House of Lords held, in accordance with what has been the universal opinion of the profession since, that the other words of the will were not sufficient to interfere with that well-established rule of law.

There are, however, some observations of the House of Lords in that case to which I should like to refer. The Lord Chancellor says (2 Bli. 49): "It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will must give way to a general intent. It is surprising that so much pains should have been taken to establish such a rule, the effect of which is, usually, to enable the first taker to destroy both general and particular intent. The words 'heirs of the body,' *prima facie*, mean all descendants: and it is likewise a rule of law that all descendants should take under these words, unless they are clearly qualified and restricted by other words so as to give them a more limited sense. The great judicial difficulty arises in the application of these rules to the words of each will. I cannot admit that all the cases cited have been well decided; but it was hardly to be expected that judges should agree in the decision of all these cases; for the mind is overpowered by their multitude, and the subtlety of the distinctions between them." To that last observation I entirely agree. The House then took time to consider their decision, and at page 53 the Lord Chancellor says: "The words 'heirs of the body' will indeed yield to a particular intent that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal."

Now we are really brought to this, whether there are or are not sufficient words in this will to show clearly and unequivocally that the words "child or children" mean "issue" or "heirs of the body"—in other words, whether the case comes within the authorities which decide that a gift to a person for life, with remainder to his children for life, with remainder to their children, creates an estate tail in the first taker.

In the first place, what is there in this will to control the ordinary meaning of the words "child or children"? The testator begins by saying in case his daughter should "die leaving a child or children behind her born in lawful wedlock." There it is obvious that the word "child" is used in its ordinary sense. Then, after directing the annual proceeds of his estates to be applied for the support and maintenance of such child or children for their lives, the testator proceeds, "and in like manner to their children and children's children." Now, what is there to show that the word "children" there is not also to be construed in its natural sense? It appears to me that there is nothing in the will to show that the word "children" is not to be construed in its natural sense.

Then the question is, whether there is an intention to give life estates to the "children and children's children" of the daughter's children,

so as to bring the case within *Mortimer* v. *West*, 2 Sim. 274. I am of opinion that there is not. The testator says the property is to go to the daughter's children "for their natural lives, and in like manner to their children and children's children." Why should "in like manner" necessarily mean "for their natural lives"? It means simply that the property shall "go in like manner," that is, go to them successively, but not necessarily for their lives.

Supposing it does mean "for their lives," then we have a succession of life estates, and I am told that according to *Mortimer* v. *West*, that would create an estate tail in the daughter. There is a good deal to be said in favor of that view, because Lord Justice Rolt said in *Forsbrook* v. *Forsbrook* that a succession of life estates might, by applying the doctrine of *cy pres*, be held to create an estate tail in the first taker, and I should feel bound, if necessary, to follow the opinion of a Lord Justice. But in *Mortimer* v. *West* there was an evident and expressed intention that the children and children's children should take estates for life, but here there is no such clear intention. It appears to me, therefore, that that case does not oblige me to decide what I do not intend to decide.

Even if the *cy pres* doctrine applied, what is the meaning of sacrificing the particular intent to the general intent? It means only so far as it is necessary to do so. This was overlooked in the earlier cases; and the true explanation of the principle was, I believe, first suggested by Lord Denman in *Doe* v. *Gallini*, 5 B. & Ad. 621; 3 A. & E. 340; so that, in order to carry out a testator's imperfectly expressed intention to include under the limitations in his will every member of his family, you can give, first, an estate for life to the first taker, and preserve an estate to the children, and then you imply an estate tail in remainder to the first taker: that is to say, you sacrifice the particular intent to the general intent, but you do not imply new limitations so long as the old limitations can be carried out.

If you say that you only sacrifice the particular intent so far as may be necessary to carry out the general intent according to law, that is to express what I think is the rule; and this principle was recognized in *Forsbrook* v. *Forsbrook*, where, upon the construction of the will, the Lords Justices preserved life estates to the children of the first takers, and gave estates tail in remainder to the first takers. Therefore, if it were necessary for me now to do so, I might decide in accordance with that view; but I have only to decide now that the children of the petitioner, if she should have any, take life estates in this property. Whether it is well given over, it is not necessary for me now to decide, but the question will arise after the death of the children whether or not the effect of the gift to the petitioner's children's children is to vest in her an estate tail in remainder; that question, as I have said, I refuse to decide now.

That being my view of the case, I will only decide at present that the petitioner takes an estate for life, and that she does not take an

immediate estate tail in possession; and I give no opinion as to what becomes of the property after the death of her children, if she has any.

There will, therefore, be simply a declaration that the petitioner does not take an estate tail in possession in the testator's freehold and copyhold estates, nor an absolute estate in the leaseholds, but a life estate only.

SECTION VIII.

ACCUMULATIONS.

SOUTHAMPTON *v.* HERTFORD.

CHANCERY. 1813.

[*Reported* 2 *V. & B.* 54.]

By indentures, dated the 12th and 13th of July, 1790, estates were conveyed in strict settlement; subject to a term of 1000 years upon the following trust: —

That during the minority or respective minorities of any person or persons respectively, who for the time being should by virtue of the limitations hereinbefore contained be immediate tenant for life, in tail male, or in tail, in possession of or actually entitled to the yearly rents, issues, and profits, the trustees should receive and take the yearly rents, &c., and pay and apply so much as should remain after answering the payments before or after mentioned in or towards the discharge of the principal sums, which should then affect the said estates, so that they might be completely freed and discharged from the same; and after payment of all such charges and encumbrances should during such minority or respective minorities as last mentioned, lay out and invest the said yearly rents, &c., in the purchase of public stocks or funds, or upon government or real securities in England, to be from time to time altered and varied as occasion should require; and receive the dividends, interest, &c.; and lay out and invest the same in the purchase of or upon stocks, funds, or securities, of the like nature, to be also from time to time altered and varied, so that the same might during such minority or respective minorities, as aforesaid, accumulate; and to stand possessed of and interested in the sums of money, stocks, funds, and securities, to be purchased with such yearly rents, and the interest, dividends, and annual produce, respectively, and the accumulations thereof respectively, and the dividends and annual produce of such accumulations, in trust for such person or persons respectively as should immediately upon the expiration of such minority or respective minorities, as aforesaid, or the death or deaths of such minor or minors, as aforesaid, be tenant or tenants in possession, or entitled to the rents

and profits, and be of the age of twenty-one years; and that in the mean time and until the said rents, issues, and profits should amount to a sum competent for the discharge of the sums so to be discharged, the trustees might invest the same in the purchase of stock, &c., and that in such case the dividends and interest of such last-mentioned stock should be accumulated, and the same and the accumulations thereof be laid out and invested, as last hereinbefore mentioned, till the same respectively should be applied in the discharge of the said sums of money so to be discharged.

The bill contended, that the direction for the accumulation of the rents and profits, during minority, until there should be a tenant in possession of the age of twenty-one, is illegal and void; and that, therefore, the plaintiff, as tenant in tail, is entitled to all the estates, and to all, or so much of, the rents and profits as should remain after discharging the encumbrances.

Sir Samuel Romilly, *Mr. Bell*, and *Mr. Heald*, for the plaintiff.

Mr. Hart and *Mr. Roupell*, *Sir Arthur Piggott*, *Mr. Leach*, *Mr. Martin*, *Mr. Wetherell*, and *Mr. Phillimore*, for the different defendants, claiming in remainder; *Mr. Richards* and *Mr. Perkins*, for the trustees.

May 18. THE MASTER OF THE ROLLS. [SIR WILLIAM GRANT.] In the case upon Mr. Thellusson's will it was admitted on all sides, that trust of accumulation could not exceed the limits of executory devise: it was on one side strenuously contended, that it could not go so far: but it was decided, that so long as an estate may be kept from vesting, so long accumulation may be directed. An estate may be kept from vesting, until an unborn child of a person in being attains the age of twenty-one: but an estate could not be limited so as to vest only in the first descendant of a person in being, who might attain twenty-one; as that descendant might be the child of an unborn child, or a person more remote; and the period therefore much beyond the allowed limits.

That is the direction as to the continuance of this accumulation; and the consequent suspension of vesting of the accumulated fund; as, if there should be a succession of tenants for life, dying under twenty-one, the accumulation would be to continue, and the accumulated fund to vest only in a person, attaining that age, however remote the period. To that extent it is impossible to support it: whether it can be supported to any extent I shall not determine, until I see the case of *Phipps* v. *Kelynge* in the register's book. An executory devise, exceeding the allowed limits, is void *in toto;* and in *Griffiths* v. *Vere*, 9 Ves. 127, it seems to have been very much taken for granted, that, independently of the Statute, the same rule would apply to a trust of accumulation; but the object of the Statute was held sufficiently answered by cutting down the excess. In *Phipps* v. *Kelynge* the trust does seem supported to a certain extent, and disallowed as to the rest. My present impression is that there was room there for a severance of the trust into different portions; which seems to be precluded by the frame of the present settlement.

May 24. I have examined the case of *Phipps* v. *Kelynge;* and find it is in substance as stated in the note in Fearne's Executory Devises;[1] but, when the circumstances are attended to, I do not think, it will be found to be an authority for the proposition, that a trust for accumulation, exceeding the allowed limits, is void only for the excess. Lord Alvanley in the *Thellusson Case* says (4 Ves. 338) that *Phipps* v. *Kelynge* is not properly a case of accumulation; as Phipps had a right to call from time to time to have the rents and profits laid out in lands to be settled. That certainly was so; and there was a direction, that, until proper purchases could be found, the money should be laid out in government or real securities, and the interest paid to the persons, who would have been entitled to the rents and profits. There was therefore no period, during which the rents and profits of the leasehold estate would have been wholly withdrawn from enjoyment. Still to a certain degree there was a trust for accumulation; as the rents and profits themselves are not to be enjoyed, but only the produce thereof, when invested in land or securities. Whether that was a trust wholly void, or good in part and bad in part, Lord Camden under the circumstances of the case had no occasion to consider; as the eldest son, the first tenant in tail, had attained twenty-one, before the suit was instituted. He did not quarrel with the past application of the rents: nor was it his interest to do so; as his father, the tenant for life, was living. All he contended against his brothers, entitled to estates tail in remainder, was, that this sort of accumulation should go no farther; the leasehold estates having vested absolutely in him, as tenant in tail of the freehold, subject to his father's life estate. If that was true, as it was held to be, it was immaterial, whether the trust was retrospectively good, or not; and therefore it would be too much to construe the declaration, that the trust ceased and became void upon his attaining the age of twenty-one, into a positive decision, that, until he attained that age, it was valid and effectual; that being a point, on which no decision was sought by any of the parties in the cause.

As Lord Camden decided, that the first tenant in tail became absolutely entitled to the leasehold estate, I do not see distinctly, how it

[1] "The Duchess of Buckinghamshire, by her will, gave certain leasehold estates to her son in trust, from time to time during the term of years therein, to lay out the yearly profits in the purchase of lands of inheritance, and to settle the same to the use of Phipps, during his life, remainder to the use of trustees to preserve contingent remainders, remainder to the first and other sons of Phipps successively in tail male, with several remainders over. Phipps had a son who attained 21 years of age; and the question was, to what extent, in point of time, the accumulation, and investing the rents, was good?

"The case was argued before Lord Camden on Monday the 20th of July, 1767. His Lordship decreed, that the trust declared by the will of accumulating the rents of the leasehold estates, to be laid out in the purchase of lands to be settled as therein directed, ceased, and became void on the said sons attaining 21 years of age, the law not permitting a leasehold interest to be settled, unalienably, beyond the time of the first unborn person entitled thereto, his or her arriving at the age of 21 years" (*Fearne, Cont. Rem.*, p. 616). — Ed.

could be held, that it vested in him only at the age of twenty-one. The decision upon the first point implied, that the leasehold estate was to be considered as subject to the same limitation as the freehold, notwithstanding the attempt to confine the successive takers to the enjoyment of less than the entire rents and profits of the leasehold. If so, the general rule is, that the leasehold estate vests absolutely upon the birth of the first tenant in tail of the freehold. The question then would have been, whether the direction for a modified accumulation was to be taken as a declaration of intention, that the two estates should go together, subject to such modified accumulation, as long as the rules of law and equity would permit; and whether a court of equity would in consequence of such intention suspend the vesting as long as the testatrix herself might by a specific provision have suspended it.

In the case of *Ware* v. *Polhill*, 11 Ves. 257, where the rents and profits of leasehold estate were to go to the persons, entitled to the rents of the freehold and copyhold estates, but with a power to the trustees at any time with consent of the persons so entitled, or, if minors, at their own discretion, to sell, and invest the produce in real estate to the same uses, the Lord Chancellor held, that, notwithstanding the power, the leasehold estate vested absolutely in the first tenant in tail from the time of his birth.

The present case however is different from either of those. This is an attempt wholly to sever the surplus rents and profits from the legal ownership of the estate for a time, that may extend much beyond the period, allowed for executory devises or trusts of accumulation; and to give them to a person, who may not come into existence until after that period. I do not see, how any part of such a trust can be executed. In *Ware* v. *Polhill* the Lord Chancellor held the power of sale to be void upon the ground, that it might travel through minorities for two centuries; and adds (11 Ves. 283), "If it is bad to the extent, in which it is given, you cannot model it to make it good. In *Lade* v. *Holford* the court did not attempt to model the trust, and make it good in the extent, to which it might have been well carried on in its creation. As to the possibility, that Lord Southampton may attain the age of twenty-one, that never has been held to be an answer to the objection, that the trust, as originally created, is too remote. Supposing this accumulation allowed to go on, and he dies under twenty-one, what is to become of the accumulated fund? The deed says, it shall go to the first person entitled to the estate, who shall attain twenty-one; though there should be no such person for a century to come. As it is impossible so to dispose of it, I should thus deprive Lord Southampton of the rents and profits during the years he had lived upon the speculation, that he might live to take the accumulated fund.

My opinion is, that this trust is altogether void; except so far as it is a trust for the payment of debts.[1]

[1] See *Smith* v. *Cuninghame*, 13 L. R. Ir. 480 (1884).

CURTIS *v.* LUKIN.

CHANCERY. 1842.

[*Reported* 5 *Beav.* 147.]

THE questions in this cause were, first, whether the trustees and executors of the will of the testator, Mr. Shadrach Venden, had committed a breach of trust, by not investing the rents of three leasehold houses in Oxford Street and Audley Street, so as to accumulate and form a fund for the renewal of the leases of two houses in Church Street, which had been bequeathed for the benefit of his niece the defendant Mrs. Curtis and her children; and secondly, whether the plaintiff, who was one of the children, was now entitled to call for the performance of this trust, or to charge the representatives of the executors of Shadrach Venden with the breach of trust.

The testator was possessed of two leasehold houses in Church Street for a term, of which between sixty and seventy years were unexpired, and he possessed three other leasehold premises in Oxford Street and Audley Street.

By his will, dated in 1794, he bequeathed the two houses in Church Street to four trustees, upon trust for the defendant Elizabeth Curtis (then Elizabeth Cheverell) for life, for her separate use, and from and after her decease, upon trusts which were expressed as follows: — "to the use and benefit of any child or children my said niece Elizabeth Cheverell may leave by any husband or husbands she may happen to marry, equally to be divided amongst them, if more than one, share and share alike, and if but one child, the whole to such one child; but in case my said niece Elizabeth Cheverell shall not, at her decease, leave any child or children, then to the use of my nephew Shadrach Venden Cheverell."

The testator then bequeathed to his trustees the three leasehold houses in Oxford Street and Audley Street, upon trusts which he declared as follows: — "upon trust, that they my said trustees shall and do, from time to time, receive the rents, issues, and profits of the above three leasehold messuages or dwelling houses situate in Oxford Street and Audley Street aforesaid, and lay out the same at interest till my several leasehold messuages or tenements hereinbefore mentioned, situate and being in Church Street aforesaid shall become *nearly expired*, and then, to pay and apply *such part thereof as shall be necessary*, in the renewal of my several leasehold messuages or tenements situate and being in Church Street aforesaid, for the benefit of the respective persons to whom I have before, by this my will, given the same." And he gave the money arising from the rents of his houses in Oxford Street and Audley Street, and the interest arising therefrom after answering the several purposes aforesaid, between Edward Venden,

Shadrach Venden Cheverell, and Elizabeth Cheverell, and he also gave his residuary estate to the three last-mentioned persons.

The testator died in 1795, so that the Thellusson Act (39 and 40 G. 3, *c.* 98) was inapplicable to this case.

After the testator's death, the trustees and executors, for some time, continued to accumulate the rents of the Oxford Street and Audley Street property. The leases expired in 1817, and it was stated, that the accumulated fund was afterwards divided amongst the residuary legatees.

Mrs. Curtis, the tenant for life, was still living, and this bill was filed by one of her children, seeking a declaration, that the rents of the Oxford Street and Audley Street property ought to have been accumulated for the purpose of renewing the leases of the Church Street property; that the trustees and their representatives might be held responsible for the breach of trust, in not doing so, and that the money recovered might be applied in the renewal of the leases of the Church Street property.

The defendants, the representatives of the trustees, insisted, first, that the trust was void for uncertainty; 2dly, that the period during which the accumulation had been directed might possibly exceed the limits allowed by law, and was therefore void.

Mr. Kindersley and *Mr. Younge*, for the plaintiff.

Mr. Baily, for the widow and the other children.

Mr. Pemberton, *Mr. Hodgson*, and *Mr. D. James*, for the representatives of the surviving trustees.

Mr. Tinney, *Mr. Bacon*, *Mr. G. Turner*, *Mr. Beales*, *Mr. Spence*, *Mr. Renshaw*, and *Mr. F. J. Hall*, for other parties.

The Master of the Rolls. [Lord Langdale.] It is contended, that under this trust for renewal, the trustees were to receive the rents of the houses in Oxford Street and Audley Street, and accumulate them, until the leases of the other two houses had become nearly expired, that is nearly to the year 1863, when the last of these leases would expire or be upon the point of expiring, and then procure the best renewal of the leases they could.

To this it is objected, that it is carrying on an accumulation of rent and income beyond the period which the law allows, for it is not limited to a life in being and twenty-one years afterwards, but may continue very much longer; this indeed is perfectly evident. The reply given to this objection is to this effect: — it is very true, that if the trust be literally followed, it would be too remote, but it ought not to be literally followed, because, within the period allowed for accumulation, there must be persons ascertained, who alone would be entitled to this fund and every part of it: again, it is possible that Mrs. Curtis might live beyond the term of the leases, in which case a renewal might properly be made in her lifetime; but even supposing her to die at any time whatever within this period, then that in twenty-one years after her death, the persons authorized by law to dispose of the

property, might divide it at once, and thus prevent the future accumulation of the fund, and obviate the mischief which the rule of law intended to prevent.

Now the persons who would be entitled in that event, would be the children which Mrs. Curtis might leave and the persons entitled to the residue of the money, after answering the purposes which the testator intended to be effected. They might all be in a state competent to consent. Nevertheless, in that state of things, it is perfectly manifest, that although amongst themselves they might make a title to the fund to be accumulated for renewal, yet each of them would be uncertain as to the amount of his share, or of that which was his; no one of them could say, such a share of this property is mine, I have a right to sell or dispose of it as I please, and in doing so, I am acting according to the intention of the testator.

In all cases of this kind, I apprehend, we are to look at the directions of the will, with reference to the property of the testator at the time of his death, and with reference to the persons, who, under the directions of the will and according to the intention of the testator, may, at a future period, have a legal power to dispose of the property. If, according to the intention of the testator, some person or persons must not necessarily be in existence, with legal power to dispose of the property, within the period limited by the rule of law, then, I apprehend, the gift is too remote.

Now here, such was not the intention of the testator; the intention, according to the argument which is used, was that the accumulation should go on, as to part of this at least, until the period when the last lease was about expiring, that is until 1863, which period, it is evident, might be beyond that limited by law; if the contrary were done, it would be done, not in pursuance of any power given to them by the will, but in consequence of a power which they have, of coming to an arrangement amongst themselves, by which they compromise their respective claims under the will, and create for themselves aliquot defined shares in this part of this property, doing that for themselves, but proceeding in a manner directly contrary to the intention of the will.

I should have been very willing to have attended to any authority which might have been brought forward to support the proposition, that this might be done; none has been cited. The case of *Saunders v. Vautier*, Cr. & Ph. 240, and 4 Beavan, 115, is, I apprehend, entirely different from this. It has frequently happened in this court, that a testator has given to an individual an absolute vested interest in a defined fund, so that, according to the ordinary rule of law, he would have a power, of his own authority, to receive or dispose of it immediately on his attaining legal age; but having given such a vested interest, the testator has, nevertheless, postponed the time of giving him possession, till a period subsequent to the legatee's attaining twenty-one, although in such cases, the party having attained the age

of twenty-one cannot, according to the direct intention of the will, obtain possession, yet he has everything but possession; he has the legal power of disposing of it, he may sell, charge, or assign it, for he has an absolute, indefeasible interest in a thing defined and certain; the court, therefore, has thought fit (I don't know whether satisfactorily or not), to say, that since the legatee has such the legal right and power over the property, and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own, at this very moment. The court has, in such cases, ordered payment on his attaining twenty-one. I don't think that case is analogous to this, because there the property is defined and ascertained; here it is not, for the shares cannot be ascertained until the period for renewal has arrived, when it will become known what sum is necessary for that purpose.

Besides this, I think there are other objections on the ground of uncertainty, which I do not think it necessary to enter into in detail, as my opinion is clear upon the grounds I have stated; nevertheless, I may say that I think the uncertainty of the shares, which the children are to have, an uncertainty arising partially from the uncertain demand which they have upon the fund to be accumulated; for the purpose of renewal is such, that nobody can tell what ought to be done under this trust.

On the joint ground of remoteness and uncertainty, it appears to me that this trust cannot be sustained; I think this bill must be dismissed, and under the circumstances it must be dismissed with costs.

MARTIN *v.* MARGHAM.

CHANCERY. 1844.

[*Reported* 14 *Sim.* 230.]

SAMUEL BUTLER, by his will dated in May 1821, bequeathed the whole of his property to trustees in trust to convert the same into money and to invest the proceeds in the three per cents, and after paying certain annuities, to add the dividends to the capital until it should produce an income of £600 a year; when he hoped that every five years' receipt of that income would produce an increase of income of £150 a year; and his will was that every such increase of income should be appropriated as he should thereafter specify, for the benefit of the parish charity-schools of this country, in the following order, namely, the first school to receive the benefit, was to be St. Ann's, Limehouse; the second, St. Paul's, Covent Garden; the third, St. Mary's, Sandwich; the fourth, St. Paul's, Shadwell. The testator then named nine other parishes, and left it to his trustees to fix, appoint and establish, in regular rotation, the

remaining parish charity-schools, taking always the nearest parish to the last establishment.

The testator died in May 1837.

A suit for the administration of his estate came on for further directions.

Mr. Cooper and *Mr. Lloyd*, for the next of kin.

Mr. Romilly and *Mr. Daniel*, for the trustees.

Mr. Stuart, *Mr. Spence*, *Mr. Lovat*, *Mr. Wray*, *Mr. Prescott White*, *Mr. Heathfield*, *Mr. Simpson*, and *Mr. Jervis*, appeared for the other parties.

The Vice-Chancellor. [Sir Lancelot Shadwell.] Although the particular mode in which the testator meant the benefits to be doled out to the objects of his bounty cannot take effect, yet, as there is, confessedly, a devotion of his personal estate to charitable purposes, my opinion is that his next of kin have no claim at all to his property. I conceive that, if a testator has expressed his intention that his personal estate shall be, in substance, applied for charitable purposes, the particular mode which he may have pointed out for effecting those purposes, has nothing to do with the question whether the devotion for charitable purposes shall take place or not: and that, whatever the difficulty may be, the court, if it is compelled to yield to circumstances, will carry the charitable intention into effect through the medium of some other scheme.

I shall, therefore, declare, that subject to the annuities, there is a good gift of the residue to charitable purposes to be carried into effect according to a scheme to be settled by the master; and I shall direct the master, in settling the scheme, to have regard to the objects specified in the will.[1]

[1] Part of the case, relating to another point, is here omitted.

See *Odell* v. *Odell*, 10 Allen, 1 (1865).

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